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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ISABELLE GARWOOD,
Plaintiff in Error,

vs.

JOSEPH SCHEIBER and MORRIS SCHEIBER and JOHN SCHEIBER,
Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

By MR. MACOMBER.

Filed this.....day of February, A. D. 1917.
FRANK D. MONCKTON, Clerk.

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This action was brought to secure an abatement in the purchase price of land sold to the plaintiff. The land is situated in Sutter County, California, on the east side of the Feather River, about two miles south of the town of Nicolaus. Jurisdiction is based upon diversity of citizenship, the plaintiff being a citizen of a state, and the defendants being aliens. The complaint counts upon deficiency in quantity and also upon deficiency in quality. The case was tried in the District Court for the Northern District of California, the Hon. Wm. H. Sawtelle, of Arizona, judge presiding, and without a jury. He made a general finding

in favor of the defendants. There was no opinion filed nor any findings of fact. The cause was brought to this Court on writ of error.

STATEMENT OF THE FACTS.

Stated in the concrete, the facts are as follows: In the month of September, in the year 1911, the plaintiff, a citizen of the State of New York, was sojourning in California, and happened at that time to be in the City of Sacramento. Through the sale of some securities, there had recently been put into her hands the sum of six thousand dollars which required some kind of investment, and she thought to invest it in land. With this end in view she called at the office of a concern, doing business at that time in Sacramento, known as the California Colonization Company, a corporation, but composed of only three members or shareholders—Mr. Crane, Mr. Dike and Mr. Green. These three gentlemen, doing business at that time under the firm name and style of "California Colonization Company," represented, and were the agents of, the vendors in the sale of land from which this action arose. Mr. Green was absent from Sacramento during the period of the negotiations, and the sale was effected by Mr. Crane and Mr. Dike, assisted by a subagent in the person of Mr. Harry K. Brown. On the occasion of her first visit to the office of said agents, the plaintiff told them that she would not consider any proposition they might make to her until there could be present a gentleman in whom she had great confidence, and who would advise her, and upon whose

judgment she would rely. At this time the plaintiff was engaged to marry a man by the name of F. I. Ramos, a physician of New York City, and a man about fifty years of age. He was a graduate of Harvard, and had formerly been an officer in the English Army, and was a man of considerable education and experience. In response to a wire from the plaintiff, Dr. Ramos came to Sacramento, and, upon his arrival, the plaintiff took him to the office of Messrs. Crane and Dike and introduced him to them as her betrothed. It seems that Dr. Ramos and Mr. Crane were both men of convivial habits, as they would frequently leave the plaintiff to go to the bar for refreshments. The plaintiff took Ramos to the office of Messrs. Crane and Dike on Wednesday, the 20th day of September, 1911, and on that same day Mr. Crane, and Mr. Bucholz, who drove the automobile, took the plaintiff and Ramos down the Sacramento River to look at some land. On the return trip to Sacramento in the afternoon, they passed near a saloon, and the three men, Crane, Bucholz, and Ramos, left the plaintiff sitting alone in the machine, and went to the saloon where they remained for twenty or thirty minutes. After leaving the saloon the three men started to discuss alfalfa land, and then, for the first time, the land in Sutter County was mentioned to the plaintiff. The following day, Thursday, the 21st day of September, 1911, the plaintiff, in company with Ramos, Mr. Dike and Mr. Bucholz, made the trip to the land in Sutter County. The following Monday, September 25th, 1911, at the urgent solicitation and advice of Ramos,

and only five days after it was first mentioned to her, she signed the contract to buy the land and paid a deposit of five thousand dollars. She had had no idea of investing that much money, or in such a property, and she had to heavily encumber herself to raise the money. It afterwards developed that Messrs. Crane and Dike had secretly paid Ramos the sum of fifteen hundred dollars, as a stipend for inducing the plaintiff to buy the land. The plaintiff was entirely ignorant of land and alfalfa, and she had never had any experience in buying land, and had never had any experience in business dealings of any kind, and these facts were known to the defendant's agents, Crane and Dike. The plaintiff made but one visit to the land before signing to buy it, and the defendants and their agents then showed plaintiff only the clear and level portion of said land and assured her that it was all of that character. The land was represented to plaintiff as being six hundred acres of the finest alfalfa land in the State, and was sold to her at $125 an acre, making an even $75,000. And it was represented to be free from overflow. Mr. Dike, and also her confidential adviser, Dr. Ramos, assured her that she could cut it up and sell it in small parcels and make three times what she paid for it. It was in the belief that these statements were true, and upon the counsel and advice of Dr. Ramos, that plaintiff bought the land. At the time she bought the land, plaintiff believed that she was getting six hundred acres of first class alfalfa land. All she got, however, was a tract containing not more than four hundred and fifty acres

that could be used for any agricultural purpose whatever. The absolute shortage amounted to about seventy or eighty acres; that is to say, she did not get more than five hundred and thirty acres of land in any event. Of that five hundred and thirty acres, all but four hundred and fifty acres lay outside of the levee, and consisted of sand and gravel beds and swamp, and is generally conceded by all the testimony to be absolutely worthless for any agricultural purpose. During the wet season it is for long periods of time entirely submerged. In regard to the swamp land lying outside of the levee, the evidence is clear and uncontradicted to the effect that no one ever told her about it, but on the contrary led plaintiff to believe that the levee constituted the western boundary of her land, and that the six hundred acres stretched away to the eastward. Dr. Ramos died several months after the sale.

Before proceeding further it will be necessary to familiarize the Court with the topography and general features of the land in question. By looking at Defendant's Exhibit J, a photograph of which appears on page 435 of the Transcript, and a photograph of which is also appended to this brief, and also at Defendant's Exhibit I, at page 434 of the Transcript, very good maps of the premises can be seen. On the map, Defendant's Exhibit J, the land will be observed as the largest one of the tracts, and is the shaded portion running northwest and southeast through Section 13, and also embracing the northeast quarter of Section 24. The Court will also observe a nar-

rower strip resembling a wing, or propeller blade, stretching away across the "cut-off" to the west of the northwest quarter of Section 13. The Court's attention is called to a rather thin line running from the little square representing the town of Nicolaus at the upper and northerlymost portion of the map, and proceeding in a southwesterly direction, and joining the Feather River at the land marked "D. Donohue." The line crosses the land involved herein between the words "Isabelle" and "Garwood." This line represents what is called the old levee, and it was the only levee there at the time the land was sold to the plaintiff. All of that part of the tract which lays to the north or west of that levee is abandoned swamp land. In the early days of California the channel of the Feather River in that locality was much deeper than it is now, and levees were almost unnecessary. In the early days the river followed the bend indicated by the dotted lines and marked "Old Channel." The description of the tract at that time followed the meanderings of the river around the bend to the sharp point at the west close to the word "old." By that description the tract actually did contain six hundred acres, or, to be exact, 609.9. As years went by, however, the river straightened its course at that point, and the levee was built along the course indicated on the map, and the narrow wing-like portion of the tract became, in time, the permanent bed of the river. In this way 150 acres of the tract were abandoned to the swamp, and about seventy acres of the tract were taken away

completely. (Tr. 146 and 147). By Section 2349 of the Political Code, the Feather River is navigable as far as Marysville. By Section 830 of the Civil Code, no one but the State can own land beneath a navigable stream. What land that there is to the north and west of the old levee is swamp and heavy jungle, and full of holes, and is saturated with water for practically the entire year. That land is of no agricultural value whatever, and defendant's valuation experts themselves placed no value on it except for the wood that happened to be growing on it. The Court's attention is directed to a zig-zag line running northeasterly across the tract in the southeast quarter of Section 13, of the map appended to this brief. This line does not appear on the original exhibit; but it does appear on one of the other exhibits in the case. It is simply used here to indicate the dividing line between the land which is conceded to be as represented, and that portion at the southeasterly end of the land which is not as represented. The rectangular portion lying between the levee and the zig-zag line consists of about two hundred and fifty acres, and this portion is not mentioned in the complaint, it thereby being conceded to be as represented. All that portion lying south of the zig-zag line, consisting of about two hundred acres, is not as represented in that it is not river-bottom land, but on the contrary is a heavy clay with but a few inches of sediment on the surface. It is not sub-irrigated, and it is not commercially practicable to raise alfalfa on it without artificial irrigation. That

portion of the land is also of very low contour, and at the time the land was sold to plaintiff those two hundred acres at the lower end of the tract were subject to overflow to such an extent that the raising of alfalfa was commercially impossible. Plaintiff asks for an abatement on the purchase price on those two hundred acres of sixty-five dollars per acre. Although the land was represented to the plaintiff as being free from overflow, she has been compelled to expend more than twenty thousand dollars in reclamation assessments to keep the water off.

SPECIFICATION OF ERRORS RELIED UPON.

The following errors will be relied upon by the plaintiff in error, viz.:

The decision and judgment of the Court in the above-entitled action is error, and said decision and judgment is against law and unjust, in this, namely, said decision is entirely unsupported by the evidence, and is contrary to the evidence, and the particulars in which said decision and judgment is contrary to the evidence, and in which the evidence is insufficient to support said decision and judgment, are as follows, to wit:

The evidence shows that the land involved in the issues of this action was sold to the plaintiff by the acre and not in gross.

The evidence shows that said land was sold to the plaintiff, and that she bought the same, as six hun-

dred acres at the agreed price of one hundred and twenty-five dollars per acre.

The evidence shows that said land was represented to plaintiff and sold to her as six hundred acres of first class alfalfa land, which was protected from overflow by levee; and that plaintiff bought said land upon and by reason of those representations.

The evidence shows that not more than two hundred and fifty acres were as represented.

The evidence shows that instead of there being six hundred acres there was an absolute shortage of more than seventy acres.

The evidence shows that instead of there being six hundred acres to said land of a character best adapted to the raising of alfalfa, there were only four hundred and fifty acres which could be used for any agricultural purpose whatever, and that there was not more than four hundred and fifty acres of said land which had any agricultural or commercial value. The evidence shows that not more than four hundred and fifty acres of said land had ever been used by defendants for agricultural purposes, and that there were not more than four hundred and fifty acres which could be used for any agricultural purposes.

The evidence shows that of the four hundred and fifty acres which might be used for agricultural purposes, not more than two hundred and fifty acres could be used for growing alfalfa, and that the remaining two hundred acres was subject to overflow

to such an extent that the raising of alfalfa thereon was a commercial impossibility.

The evidence shows that of the four hundred and fifty acres of said land which plaintiff actually received which was capable of being used for agricultural purposes, the two hundred acre portion thereof which was subject to overflow was not worth more than sixty dollars per acre, and that plaintiff was damaged to the extent of sixty-five dollars per acre for each and every one of said two hundred acres.

The evidence shows that defendants and their agents took plaintiff upon said land, but that in so doing they were careful to show her only the portion thereof which could be used for agricultural purposes, and purposely refrained from showing her the swamp land outside of the old levee, and purposely refrained from showing her that more than seventy acres of said land was at that time beneath the channel of a navigable river, and for that reason not their property and impossible of being conveyed by them, and said defendants and their agents purposely refrained from advising plaintiff of the fact that not more than four hundred and fifty acres of said land could be used for any agricultural purpose.

The evidence shows that plaintiff has been damaged in the sum of more than twenty-one thousand dollars which she has had to pay in reclamation assessments to reclaim and protect from overflow land which in said sale to her was represented to her as being free from overflow.

The evidence shows that notwithstanding this ex-

penditure of money for reclamation purposes plaintiff still has only two hundred and fifty acres of land which is as was represented to her.

The evidence shows that said land was represented to plaintiff as being subirrigated (meaning self-irrigated), and that no irrigation would be necessary for the raising of alfalfa; and the evidence shows that the same two hundred acres which were hereinbefore stated to be worth but sixty dollars per acre, that is to say, the two hundred acres at the southeasterly most end of the tract, has so little subirrigation that it is not commercially practicable to attempt to raise alfalfa thereon without artificial irrigation.

The evidence shows that the plaintiff, at the time the said land was sold to her, was a woman without any business experience or understanding, and without any experience or understanding of any character in reference to land or farming, and without any experience or understanding whatever in reference to matters appertaining to said land or the purchase thereof, and that she fully believed and relied upon the representations of defendant's agents; and the evidence shows that these facts were well known to defendants' said agents.

The evidence shows that in purchasing said land plaintiff was guided by and acted upon the advice and counsel of a friend and adviser, one F. I. Ramos, with whom plaintiff occupied a confidential relationship—with whom she was engaged to be married—which fact was at all times well known to defendants' agents who represented defendants in

said sale; and the evidence shows that, in so far as the selection of said land was concerned, said F. I. Ramos was the confidential agent of the plaintiff, which said fact was at all times well known to defendants' said agents.

The evidence does not show that said F. I. Ramos was the agent of the plaintiff for any purpose whatsoever other than to advise her in respect to what land she should or should not buy; and the precise extent of the power and agency of said F. I. Ramos for the plaintiff was well known to the defendants' said agents.

The evidence shows that defendants' said agents bribed and corrupted plaintiff's said confidential agent and adviser, said F. I. Ramos, by secretly paying to said F. I. Ramos the sum of fifteen hundred dollars, and that by reason of the said bribery and corruption of plaintiff's said betrothed and confidential agent and adviser, plaintiff was misadvised and misled to her prejudice and financial loss and damage in the sum and amount prayed for in her complaint in said action.

The evidence shows that the said land was represented to plaintiff as being "River Bottom" land, and as being subirrigated; and the evidence shows that not more than the aforesaid two hundred and fifty acres were of that character.

The evidence shows that the said land is of the following character and value, and was of the following character and value at the time of said sale, that is to say:

(1) The two hundred and fifty acres of said land lying immediately east and south of the old levee is of a character practically the same as was represented by said defendants' agents, and that said two hundred and fifty acres was at said time worth not more than the price plaintiff paid for it, to wit, one hundred and twenty-five dollars per acre.

(2) That the remainder of said land lying at the southeasterly end of the said tract were not as represented by defendants' said agents, either in respect to overflow, or in respect to subirrigation, or in respect to the character of the soil, and said two hundred acres was at the time of said sale worth not more than sixty dollars per acre.

(3) That the remainder of said land, to wit, all of that which lies outside, or northwest of the old levee, is not as represented in any respect whatsoever, and that the sixty or seventy acres of land which was actually there, and which plaintiff actually received, is useless for any agricultural purpose, and is commercially valueless.

The complaint in this action alleges that the said land in question was represented and sold to plaintiff as a certain specified number of acres of a certain specified character of land at a certain specified price per acre. The complaint alleges that there are certain acres missing, that is, that there is an absolute shortage from the number of acres represented and agreed upon. The complaint also complains and alleges that a large number of acres of the tract are not as represented, to such an extent that those acres

are unfit and unusable for any agricultural purpose and commercially worthless. The complaint further complains and alleges that a very large portion of the land, about two hundred acres, is not as was represented, and, while not agriculturally valueless, is not worth more than sixty dollars per acre. The remaining portion of the tract, about two hundred and fifty acres, is not mentioned in the complaint, it being thereby admitted that that portion of the land is practically in accord with the representations which were made to plaintiff at the time of the sale. The complaint in this action was framed, and seeks to recover, upon the theory that the plaintiff is entitled to compensation, at the agreed price per acre, for all acres missing and for all acres commercially worthless, and that plaintiff is also entitled to compensation and reimbursement to the extent to which the other acres complained of fall below the character and quality represented to the plaintiff at the time of the sale. One of the defenses interposed by the defendants was to the effect that, disregarding any representations made by the sellers, and ignoring any agreed price per acre which there might have been between seller and buyer, if it could be proven that the land in its entirety, including that portion uncomplained of, was worth the money plaintiff paid for the land, the plaintiff had received the equivalent of the money which she had parted with, and had, therefore, suffered no damage. Over the objection and exception of the plaintiff the Court allowed the defendants to put in evidence, outside of the contract

between the parties, to the effect that the land in its entirety, including that portion uncomplained of in the complaint, was worth the full amount which plaintiff had parted with under the transaction. The Court allowed a number of witnesses to testify for the defendants, that the land in its entirety was worth the sum of seventy-five thousand dollars which plaintiff had paid. This action of the Court in allowing that testimony is hereby assigned as error, and the text of the evidence and proceedings had in respect to that testimony and ruling of the Court are as follows:

Questions asked Charles F. Silva:

Q. Now, Mr. Silva, do you know what the market value of that real property, the Scheiber Brothers' ranch, bought by Miss Garwood, was on the first of November, 1911?

Mr. MACOMBER.—One moment. What do you refer to, the entire land?

Mr. MILLER.—Yes.

Mr. MACOMBER.—You asked him if he knew?

A. Yes, I do.

Mr. MILLER.—Q. What was the market value?

Mr. MACOMBER.—We object to the question; we object to any testimony being taken as to the ranch in its entirety, upon the ground that it is incompetent, immaterial and irrelevant, and not within the issues of this case, and has nothing to do with this controversy.

The COURT.—The objection is overruled.

Mr. MACOMBER.—We note an exception.

EXCEPTION No. 3. (Tr., p. 286.)

(Questions asked G. A. WESSING.)

Q. Did you know the value of the Scheiber property or the Garwood property in 1911? A. Yes.

Q. Taking the ranch as it stood there as a whole at that time, what was its valuation?

Mr. MACOMBER.—Now, one moment, if your Honor please, in order to save time, it will be understood that my objection made yesterday to the value of the ranch in its entirety or the value of the property not described in the complaint will run to all these questions?

The COURT.—Yes.

Mr. MACOMBER.—Subject to the same ruling?

The COURT.—Yes.

Mr. MACOMBER.—I note an exception.

EXCEPTION No. 7. (Tr., p. 307.)

(Questions asked ISABELLE GARWOOD, the plaintiff.)

Q. Now, Miss Garwood, about three months after you got this place did Mr. Charles Silva offer to take it off your hands at the price you paid for it?

Mr. MACOMBER.—We object to that as immaterial, irrelevant, and incompetent and nothing to do with this case whatever; it does not make any difference what offer was made to her.

The COURT.—When was that?

Mr. MILLER.—About three months after the purchase of the property.

The COURT.—I will overrule the objection.

Mr. MACOMBER.—We note an exception.

EXCEPTION No. 2. (Tr., p. 222.)

(Questions asked CHARLES F. SILVA.)

Mr. MILLER.—Q. Mr. Silva, did you on the occasion of a visit to the ranch with Miss Garwood, shortly after her purchase of the Scheiber property, offer to pay her $75,000 for that ranch?

Mr. MACOMBER.—We object to the question on the ground that it is immaterial, irrelevant, and incompetent.

The COURT.—The objection is overruled.

Mr. MACOMBER.—Exception.

EXCEPTION No. 4. (Tr., p. 286.)

A. Yes.

Irrelevant documentary evidence allowed by the Court:

Mr. HEWITT.—We now offer in evidence a certified copy of the judgment-roll in the case of Isabelle Garwood vs. L. M. Curtis et al., a record of the Superior Court of the County of Sutter, State of California, together with all endorsements on the several papers constituting the judgment-roll, it being an action of plaintiff to correct and quiet the title to the property which she purchased of the defendants in this action.

The COURT.—Who are the parties defendant?

Mr. HEWITT.—There are about forty or fifty of them, I should judge, if the Court please. It was a

proceeding brought under Sections 749, 750 and 751 of our Code, and the object of introducing it is for two purposes; first, the contract entered into between plaintiff and defendants provides if there are any defects in the title that they will be rectified, if your Honor please, to the extent of $250 expenses toward carrying it out; the second is that the complaint in this action is a verified complaint, verified by plaintiff herself, and shows which she says under her own verification she is the owner of; that is, it gives a description of it.

Mr. MACOMBER.—Now, if your Honor please, we object to this upon the ground that it is immaterial, irrelevant, and incompetent, and has nothing to do with this case.

The COURT.—It may be received in evidence.

Mr. MACOMBER.—We note an exception.

EXCEPTION No. 5. (Tr., p. 302.)

Mr. HEWITT.—I now offer in evidence a certified copy of the warrant issued by reclamation district No. 1001, bearing date December 30, 1911, for the sum of $5,106.43, together with all endorsements on the warrant in question, the warrant being endorsed, "Pay to the order of Isabelle Garwood, Levee District No. 6, by J. J. McNamara, Chairman, Julius Rolfe, Clerk," also endorsed "Isabelle Garwood"; also endorsed a second time "Isabelle Garwood and C. E. Williams."

Mr. MACOMBER.—We object to this being introduced in evidence upon the ground it is immaterial,

irrelevant and incompetent, and has nothing whatever to do with this case; but we will stipulate that it be admitted in evidence if counsel be fair on his part and stipulate that it had nothing to do with the purchase price; that the defendants received the $75,000 and the plaintiff has been assessed subsequent to that time $26,000 to keep the land free from overflow, and this amounts merely to a reduction, making the assessment $21,000;—if counsel will stipulate that, I will withdraw my objection.

Mr. HEWITT.—We will make no stipulation to that effect because of the very nature of the assessment.

The COURT.—The objection is overruled, and it may be received.

(The document is marked Defendant's Exhibit "H.")

Mr. MACOMBER.—We note an exception.

EXCEPTION No. 6. (Tr., p. 303.)

ARGUMENT ON THE ERRORS OF LAW.

Argument As To Exceptions Number Three and Number Seven.

The Court erred in admitting evidence as to the value of the land in its entirety or in reference to that portion of the land not mentioned in the complaint. As against this contention, the defendants urge the doctrine as to the measure of damages laid down in *Smith* vs. *Bolles,* 132 U. S. 125, 33 L. ed., 279, and *Sigafus* vs. *Porter,* 179 U. S. 116, 44 L. ed., 113. We

wish to say at the outset that we have absolutely no quarrel with *Smith* vs. *Bolles* or *Sigafus* vs. *Porter*. In fact, as we will presently show, we rely on that doctrine. *Smith* vs. *Bolles* was a case where a party bought 4000 shares of mining stock for $1.50 a share, therefore paying $6000.00 for the stock. The complaint alleged that the stock was wholly worthless, but that if it had been as represented it would have been worth ten dollars a share, or $40,000.00. On that theory the plaintiff asked for $40,000.00 damages. He was seeking to recover damages resulting from an unrealized speculation. He asked for $40,000.00 damages where he had parted with only $6000.00. The situation was practically the same in the case of *Sigafus* vs. *Porter*. In that case the plaintiff bought a gold mine for $400,000.00, which turned out to be worthless. The complaint alleged that if the property had been as it was represented to be it would have been worth One Million Dollars, and, as it was worth nothing, they asked for One Million Dollars damages. In each of these cases the sale was in gross, and in each case the plaintiff sought to recover an amount far in excess of what had been lost. Now let us look at the case at bar. There is an absolute deficiency of seventy-five acres, and then there are seventy-five acres that are agriculturally worthless, thereby making the moral shortage 150 acres. Now let us assume that our complaint had been framed on the same theory as the complaint in *Smith* vs. *Bolles* and *Sigafus* vs. *Porter*. Assume, for instance, that alfalfa land, of the character of that which was represented to the

plaintiff, is worth one thousand dollars an acre. As the land is one hundred and fifty acres short, it would necessarily be worth just $150,000.00 less than it would have been had it been as represented. In our complaint, therefore, we would allege our damage to be just $150,000.00, notwithstanding the fact that the plaintiff had bought the land for $125.00 an acre, and had parted with only $75,000.00 altogether. Proceeding on that theory, we would be seeking to obtain damages for the loss of the bargain, or, as it is expressed in *Smith* vs. *Bolles,* we would be trying to get damages "covering the fruits of an unrealized speculation." But that is just where our case differs from *Smith* vs. *Bolles* and *Sigafus* vs. *Porter.* The plaintiff in this case is not trying to recover for the loss of a bargain, nor is she trying to get damages "covering the fruits of an unrealized speculation." The plaintiff in this case is merely asking for a reduction in the purchase price corresponding to the deficiency in the land. The complaint in this case is framed on the theory that plaintiff is entitled to an abatement of the purchase price to the extent of the money which she paid for acres which she did not get. Defendants agreed to give plaintiff 600 acres of land, at the stipulated price of $125.00 per acre, and the complaint is framed upon the theory that she is entitled to recoup $125.00 for each acre that they failed to give her, and that she is also entitled to compensation to the extent that any of the acres may fall below $125.00 in value by reason of their not being of the character and kind of land represented

to her. This point of difference which we have just pointed out between the case at bar and the two authorities mentioned is fundamental. In *Smith* vs. *Bolles* and *Sigafus* vs. *Porter* the sales were in gross. In the case at bar the sale was by the acre (See authorities listed under Argument to Point that Sale was by the Acre, and not in Gross). In *Smith* vs. *Bolles* and *Sigafus* vs. *Porter* the transactions out of which those cases grew were of a highly speculative and gambling character. In those cases the plaintiff put up one dollar in the *hope* of winning two. But in this case the plaintiff merely sought to purchase a certain number of acres of a certain specified character of land at a certain specified price per acre, and that price per acre must, for this case at least, be presumed to be the prevailing market value for land of that character. The transaction in the case at bar was of a staid and legitimate character, and the plaintiff is entitled to recover back money which she paid out in good faith for acres which she never received. Let us take this illustration: Suppose that an agent of the Government should go out to buy mules. He goes to the ranch of a stock grower, and sees in a corral a large number of fine-looking mules. He says to the stockman, "How much do you want for those mules?" The grower replies, "$125.00 a head." The agent then says, "How many are there?"; and the grower tells him that there are 600 mules in the corral. The agent multiplies $125.00 by 600 and finds that it is just $75,000.00; and he gives him a check on the spot, and instructs the grower to deliver

the mules at a certain point. The mules are delivered, but when counted it is found that there are only 450 head of mules. An action is commenced against the stock grower to recoup for the purchase price of the 150 mules which were paid for but never received. He defends the action by seeking to introduce evidence that the mules were actually worth $200.00 a head instead of $125.00, and that therefore the 450 mules which the Government actually got were worth more than $75,000.00, and therefore the Government had got its money's worth, and having got its money's worth had suffered no damage. Could there be found a judge in the land who would call it good law to thus allow the man to admit his falsehood in respect to the number of mules, and then avoid the consequences of his untruthfulness by repudiating his contract as to the price? Can there be any possible distinction, either legal, equitable, or moral, between the case of the mules and the case at bar? There is another viewpoint which can be properly taken of the case at bar. *Smith* vs. *Bolles* states that the measure of damages in a case of that kind is the difference in value between what was paid by the purchaser and what was actually received by the purchaser. We find no fault with that general statement; and, as a matter of fact, we rely upon it. Now, what is the value of that which the purchaser received? Did the vendee and vendors not agree upon the value, namely $125.00 an acre for first-class, river-bottom, subirrigated, alfalfa land? Must we be compelled to repudiate that agreement, and go out and

look for witnesses to testify as to the market value of the land? Must it not be presumed that the figure of $125.00 an acre was fixed and agreed upon by the parties with due regard to the prevailing market conditions and value of land at the time and place? And must not the price per acre agreed upon by the parties be taken by the Court as being, not only the best, but the only criterion of the value of the land? And if the price and value as fixed by the parties was $125.00 an acre, must not the actual value of the tract be obtained by making a proportionate diminution at the agreed price per acre for each acre missing? And must there not be also a proportionate diminution for each acre that falls below the value of $125.00 by reason of its not being of the character agreed upon? How can the vendors fall back upon the land uncomplained of and say that that is of greater value than that agreed upon in order to make up for the shortage, when they have already sold that portion to the vendee for $125.00 an acre? To allow a defendant to admit his untruthfulness in respect to the character or quantity of the land, and avoid, or endeavor to avoid, the rightful consequences of his acts, by repudiating his agreement in respect to the price, would be to encourage untruthfulness and dishonest dealing. The only questions which the Court is concerned with in the case at bar are the following: "Is it true that the understanding between the parties was that the land consisted of six hundred acres at the agreed price of $125.00 per acre?" "Is it true that the plaintiff actually bought it under those

terms, conditions, and representations?" "Is it true that the land is deficient in the respects claimed by the plaintiff?" If those questions are answered in favor of the plaintiff she is entitled to an abatement on the purchase price; and any extraneous testimony regarding the value of the land uncomplained of is entirely outside the issues and immaterial. If those questions should not be answered in favor of the plaintiff she would have no case in any event.

We will now cite a few cases to back up the reasoning we have just presented. One of the best cases, a Federal case entitled *Kell* v. *Trenchard,* we will reserve to the last.

The case of *Sigafus* v. *Porter,* one of the two leading cases relied upon by the defense, cites the case of *Howes* v. *Axtel,* 74 Iowa 400, 37 N. W. 974, as being one of the state cases applying the doctrine of *Smith* v. *Bolles.* In the case of *Howes v. Axtel,* the tract was represented to the plaintiff as being 84 acres, but it turned out to be a trifle under 76 acres, there being a deficiency of about eight acres. The plaintiff sued to recover $265.00 damages. Verdict and judgment was for the plaintiff. The land was sold to the plaintiff for $2520.00, which was thirty dollars an acre for the 84 acres represented to be in the tract. The court instructed the jury that the plaintiff's damage was the difference in the value of the land represented and agreed upon before the sale by the parties (that is, 84 acres at thirty dollars per acre, making $2520.00) and the value of the land as it actually was, that is, considering the actual number of acres. The language of

the court is not as clear as it might be; but the substance of the decision is perfectly plain. The substance of the decision is that the measure of the plaintiff's damage is the difference between that which the plaintiff parted with and that which he received under the contract, and that the value of what he received is obtained by multiplying the contract price per acre by the true number of acres, in other words that the actual value of the land, as it is, is simply the contract price, *considering the actual number of acres.* This case lays down the identical rule enunciated by *Smith* v. *Bolles* and *Sigafus* v. *Porter,* but with the additional rule for the ascertaining of the actual value of the land in cases having this point of difference.

We will quote from the opinion in *Howes* v. *Axtell,* as follows:

> "The twelfth instruction directs the jury that the price agreed upon is to be taken as the value of the 84 acres of land. This is correct. When parties by solemn agreement, fix a value to property, they are bound by it. The law will not, in a case of this kind, permit either party to dispute the value as settled by them. The instruction directs that the value of the land as it is found, *considering its real quantity,* is to be deducted from the value as settled by the agreement of the parties, and the difference will be plaintiff's damages. This rule is just, as *it gives plaintiff compensation,* and nothing more. See *Hallam* v. *Todhunter,* 24 Iowa, 167." (All italics ours.)
>
> *Howes* v. *Axtell,* 74 Iowa 400 (1888), 37 N. W. 974.

If the court will turn to page 123 of volume 179 of the United States Reports, it will find *Howes* v.

Axtell cited as one of the cases in state courts applying the rule of *Smith* v. *Bolles*. *Howes* v. *Axtell* does apply the doctrine of *Smith* v. *Bolles,* and it also decides that in cases of the character of *Howes* v. *Axtell* the only way that the court can arrive at the actual value of the deficient land is by looking to the agreement of the parties. Land values are often uncertain and elusive quantities, and it seems to us that it would be a strange and anomalous rule of law that would permit a party to solemnly contract in reference to the value of land, and thereafter go into court and request the court to ignore that agreement in order to relieve him from liability for false statements in reference to the quantity of the land.

We will cite a few state cases, after which we will take up what we consider to be the most important case we have found, the Federal case of *Kell* v. *Trenchard.*

In *Harrell* v. *Hill,* the court says:

> "Evidence was introduced and the fact conclusively established, that the tract of land in question, though less than one hundred and eighty acres, was and still is worth from twenty-five to thirty dollars per acre, and it is insisted by the counsel for appellee that it would be inequitable and unjust to permit the appellant to retain the quantity really existing and allow here compensation for the deficiency in proportion of the gross price agreed to be paid for the supposed quantity —one hundred and eighty acres. In response to this, we have to say that we can alone look to the agreement of the parties to determine the value of the premises in question. By their contract, solemnly entered into, they have computed the tract supposed to contain one hundred and

eighty acres at the gross price of one thousand five hundred dollars, or at the average value of eight dollars and thirty-three and one third cents per acre. The evidence of other persons as to their estimate of the value of the land must be regarded as foreign to the subject and not pertinent to the inquiry, the true rule in analogous cases being that the price paid must be regarded as the only evidence of the value."

Harrell v. *Hill,* 68 Am. Dec. 208-212, 19 Ark. 102.

In the case of *McComb* v. *Gilkeson,* 135 Am. St. Rep. 946, where there was a deficiency of about ten acres in a tract represented to contain 240 acres, the court says:

"As to the measure of damages in a case like this the general rule of compensation or abatement is according to the average value per acre of the whole tract, unless particular circumstances require a departure from that rule. *Watson* v. *Hoy,* 29 Gratt. 698."

McComb v. *Gilkeson,* 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 946, 947, 948.

In *Salyer v. Blessing*, the court says:

"Nor do we find available for appellant the argument of counsel that the land actually conveyed was worth more than the amount paid for the tract, assuming that it contained 1,000 acres. If this suit had been brought to recover damages for false representations as to the value or quality of the land, or upon a breach of a covenant of warranty, then the criterion of recovery would have been the difference between the value of the property as it was represented or warranted to be and its actual or market value at the time of the sale; but this action was not brought on either of

these grounds. The recovery is sought upon the ground that the vendor falsely and fraudulently represented that the tract of land contained a designated number of acres, when in fact it contained a great many acres less than was represented. This being true, the vendee failed to get what he purchased, and he received no consideration for the payment made for the deficit in the acreage. If the whole tract was sold and purchased for $10,000 supposing it to contain 1,000 acres, the average price per acre for the tract would be, of course, $10, and, if the vendee only secured in the purchase 697 acres, it is clear that he paid $3,030 for which he received no consideration. * * *

"In this state of case the only deceit practiced on the vendee was in the representation as to the quantity of land, and, this being so, it is clear that his right of recovery must be confined to the value of the deficit in the boundary, estimating the deficit at the price paid per acre for the boundary contracted for. * * *

"The conveyance shows that Salyer represented the tract of land to contain a greater number of acres than he knew it did. Induced by these representations, Blessing paid to Salyer more money than he should have paid, and, this being so, Salyer should refund to him the money wrongfully obtained, with interest thereon from the date of the payment."

Salyer v. *Blessing* (Ky., 1913), 152 S. W. 277, 151 Ky. 459.

In the case of *Cawston* v. *Sturgis,* the court says:

"But, according to the verdict of the jury, the plaintiff paid for and supposed he was buying land in area equal to little over two lots; and if, by the fraud of the defendant, he was deceived and paid for more than he actually received, it seems to us the minimum recovery should be the

amount paid for the deficiency, irrespective of the actual value of the true tract. This rule enables a vendee, who, relying upon the false and fraudulent representations of his vendor as to the quantity of land purchased, pays for land he does not receive, to recover back, in an action for damages, the amount of money paid on account of such fraud. It works substantial justice, and is amply supported by authority. *Estes* v. *Odom,* 91 Ga. 600, 18 S. E. 355; *Smith* v. *Kirkpatrick,* 79 Ga. 410, 7 S. E. 258; *Tyler* v. *Anderson,* 106 Ind. 185, 6 N. E. 600; *Parker* v. *Walker,* 12 Rich. (S. C.) 138; *Flint* v. *Lewis,* 61 Ill. 200; *Hallam* v. *Todhunter,* 24 Iowa, 166; *Sears* v. *Stinson,* 3 Wash. 615, 29 Pac. 205."

Cawston v. *Sturgis,* 29 Oregon 331, 43 Pac. 656.

In the case of *Tyler* v. *Anderson,* the court says:

"If the tracts do not contain the number of acres which the vendor represented them to contain, the defendant is entitled to an abatement out of the purchase money for so much as the quantity falls short of the representation."

Tyler v. *Anderson* (1886), 106 Ind. 185, 6 N. E. 600.

In the case of *Estes* v. *Odom,* the court says:

"The theory that the vendee must be satisfied if he got in land the worth of his money is altogether wrong. He was entitled to have what he bought and paid for, and if the fraud of the other party deprived him of a part of the same so considerable that the fraud is manifest *prima facie,* or fairly suggested as probable, by the grossness of the deficiency, the minimum recovery should be the amount paid for the deficiency, with interest thereon from the time of the payment. If the true tract, as it proved to be, was,

on account of being so small, worth less than it would have been as part of a larger tract which the vendee supposed he was getting and had a right to expect, this difference would be recoverable, no matter how valuable the true tract was."

Smith v. *Kirkpatrick,* 79 Ga. 410, 7 S. E. 258; *Estes* v. *Odem* (Georgia, 1893), 18 S. E. 357, 358, 91 Ga. 600.

We will now take up the case of *Kell* v. *Trenchard,* 142 Fed. 20. The facts of this case were: Trenchard purchased from Kell, *in one transaction,* certain property, as follows: Certain land, with certain timber thereon, and a mill thereon with certain lumbering equipment, and also certain railway equipment for handling the timber on said land. It was represented by the seller and his agent that there were 35,000,000 feet of timber on the land. Sometime after the purchase, Trenchard discovered that there were only about 8,000,000 feet of timber instead of 35,000,000 feet. In defense of the action for damages, the seller, Kell, tried to defend by urging that the sale of the entire property, *being one transaction,* he could offset the shortage in timber by showing that the property, including that other than the timber, when taken as a whole, was worth all that the purchaser paid for it. The trial court took that view of the case; and, in measuring the damages, credited the seller with the *appraised* value of the other portions of the property. The circuit court of appeals was of a different opinion, and held that the action of the trial court was erroneous, and, on page 20 of volume 142 of the Federal Reporter, the court says:

"The agreement to pay $60,000 was a single and entire undertaking for the whole property purchased; and appellant should not now be heard to say that, although there may have been fraud as charged by the appellees in the sale of the timber, the entire property was worth more than he sold the same for. This action involves solely the question of whether the appellees, by reason of the fraud practiced by the appellant and his agents, are entitled to relief because of the disparity in the quality of the timber sold. They made no complaint as to the other property; but aver that as to the timber purchased there was a warranty that there would be at least 35,000,000 feet, and that the purchase of the timber was the moving consideration that caused them to acquire the property of the appellant, it being their purpose to go extensively into the lumber business; that the appellant and his agent, Vaughn, procured the contract from them by false representation as to the quantity of timber bought; and that they, in consequence received 8,232,100 feet, instead of 35,000,000 purchased by them."

Kell v. *Trenchard,* 142 Fed. 20, 73 C. C. A. 202.

The case of *Kell* v. *Trenchard* arose in North Carolina. It was decided by the United States Circuit Court of Appeals for the Fourth Circuit in 1905. The opinion quotes with approval the cases of *Smith* v. *Bolles* and *Sigafus* v. *Porter* to the point that the measure of damages in such cases excludes all speculative losses. The opinion states that the measure of damages in such cases is the difference in the value between that which the purchaser parted with and that which he actually received. That is our position exactly, and we contend that *the actual value of that*

which the plaintiff in this case received is the contract price per acre multiplied by the exact number of acres which she received. Were it good law to disregard the terms of the contract, and take a new and *appraised* value of the portions of the property uncomplained of, it would certainly have been permitted in the case of *Kell* v. *Trenchard.*

If the court will glance through the portion of this brief entitled "Argument on the Proposition that the Sale Was by the Acre and Not in Gross," it will find case after case holding that in cases of deficiency the plaintiff is entitled to an abatement of the purchase price proportionate to the shortage in acres.

In closing our argument in respect to the trial court's error in allowing testimony respecting the market value of the land uncomplained of we will simply say that we defy counsel for the defendants to produce so much as one single case from any court in the world to support their position.

ARGUMENT AS TO EXCEPTION NUMBER THREE.

Over the objection and exception of the plaintiff (Tr., p. 286), the court allowed the defendants' witness, Charles F. Silva, to testify that he had offered to pay Miss Garwood $75,000 for the land. We submit to the court, without the citation of any authorities that the action of the court in allowing that testimony was reversible error. The testimony was entirely irrelevant, incompetent, and immaterial. What possible bearing could any offer that he might have

made, subsequent to the sale of the land to her, have upon the question as to whether or not the defendants in this action had given the plaintiff all that was represented to her? Assume that it was proper for the court to disregard the contract of the parties in respect to the price of the land, and take an appraised value of the land, would an offer to buy be any evidence of the value of the land? We submit that it is too elementary to permit of serious discussion that that is not the proper way in which to establish the value of land. The plaintiff herself vehemently denies that he ever made any such offer; but for the purpose of our argument we must assume it to be true that he did make the offer. Suppose that he actually did make such an offer: a dozen things might have transpired to cause him to make the offer—a dozen things having absolutely no bearing on the question as to whether or not there had been any misrepresentation on the part of the vendors or their agents. A railroad might have been projected across the land, and a townsite planned for that particular spot. He might have had some particular private reason for wanting that particular land, and have been willing to give several times its value in order to acquire it. Gold might have been discovered on the land, or some peculiar mineral, or agricultural, or industrial possibility might have become manifest in reference to that particular land, or land in that vicinity. We will again submit to the court that an offer to purchase real estate at any particular price is no legal evidence of the value of the land; and even if it were evidence of the value of the land it would

be entirely immaterial here for the reason that the value of that portion of the land uncomplained of is outside the issues of this case.

Argument As To Exception Number Two.

Over the objection of the plaintiff, the court (Tr., p. 222) allowed the defendants to ask the plaintiff on cross-examination if Mr. Charles Silva had not offered to buy the place from her at the price she paid for it. As no exception appears after the ruling of the court on this objection, we will not argue it except to say that the question is identical with exception number three, and, by the same reasoning applicable there, the ruling of the court in this instance was error.

Argument As To Exception Number Five.

Over the objection and exception of plaintiff, the court allowed the defendants to introduce in evidence (Tr., pp. 301, 302) a certified copy of the judgment role in an action brought by the plaintiff in this present action to quiet title to the land which the defendants had sold her. Could that record be of any possible materiality or relevance in determining whether or not fraud or misrepresentation had been practiced by the defendants? In that suit she might have claimed ownership to the whole of Sutter County, or to the whole of the State of California, for that matter, but would her doing so be any evidence that she had actually received that much property from the

defendants in this action, or would it be any evidence respecting the issues involved in this case?

Argument As To Exception Number Six.

Over the objection and exception of the plaintiff, the court allowed the defendants to put in evidence a reclamation district warrant payable to the plaintiff in the sum of $5,106.43. (See Tr., p. 302.) About the time that the defendants sold the land to the plaintiff very extensive reclamation work was being contemplated, and the actual work was started very soon after the sale. Although Mr. Dike, the vendors' agent, had represented the land to the vendee to be free from overflow, and the agents' circular (see Tr., p. 433) represented the land to be free from overflow, nevertheless the vendee was, very soon after the sale, assessed for reclamation work in the sum of $26,000. (See Tr., p. 187.) This warrant, or script, as it was called, was simply a credit, in the amount of its face value, on this assessment of $26,000. She never got any money on this warrant—it was simply a credit; it simply cut her assessment down that much, making it approximately $21,000. That is, she had to pay out $21,000 for reclamation work for the land which had been represented to her as being free from overflow. The admission of this warrant in evidence by the court was purely erroneous. If it had been introduced for the purpose of impeaching the witness in reference to some relevant assertion or denial which she had made in her testimony, it would have been

admissible, but only in the event that she had been confronted with it on cross-examination. We can not possibly see how it could be admissible as a part of the defendants' general defense.

ARGUMENT ON THE FACTS OF THE CASE.

In its consideration of the facts in this case we neither ask nor expect the court to weigh evidence. Our position in reference to the facts is that, even though all the facts testified to by witnesses for the defense be taken as true, they nevertheless do not constitute a defense as against the facts proved by the plaintiff. In our discussion of the facts, the only point on which we wish to argue is in reference to the corruption of Ramos. As to all the other points we will be content by merely directing the court's attention to the evidence as it appears in the record. In quoting from the evidence we will confine our quotations to such testimony as is not contradicted, and if we should quote testimony which is contradicted we will so state at the time. In discussing the testimony, we will first consider the representations which were made to the plaintiff; and after that we will consider the character of the land which she received. We will then take up the general conditions and features of the transaction; and after that we will discuss the corruption of the plaintiff's confidential agent, F. I. Ramos.

Messrs. Crane and Dike, doing business as California Colonization Company, were the authorized agents of the defendants. On pages 258 and 259 of the Transcript the witness Dike testifies that "before the

deal was completed we received a written authorization to make the sale" and that "The sale was ratified and confirmed by the Scheiber Brothers," and that "They paid us commission which amounted to $3750.00," and that "The commission was previously agreed upon."

The land was represented and sold to plaintiff as 600 acres, and at the agreed price of $125.00 per acre. On page 254 of the Transcript Dike testified, to-wit, "We did effect a sale to Miss Garwood of a ranch belonging to Scheiber Brothers which we represented to contain six hundred acres, three hundred of which was in alfalfa, and the balance in pasture land." On page 257 of the Transcript the witness Dike admits that the land was represented to her as 600 acres and that it was all level. On page 261 Dike testifies, "The arrangements of the sale were that we should sell the property for $75,000.00, or $125.00 an acre, out of which we were to receive 5% commission." On page 107 of the Transcript the following question was asked of the witness Crane, viz.: "Q. You were present, Mr. Crane, during the conversation held with Miss Garwood and Mr. Dike. What was said with reference to the quality; was it first-class alfalfa land, or good, bad, or indifferent?" On page 108 the witness answers, viz.: "It was represented as being first-class alfalfa land by Mr. Dike." Immediately following that answer is this question, viz.: "Mr. Macomber: Q. You know that of your own knowledge?" "A. Yes, sir." "Q. Mr. Crane, at what price per acre was that land put up?" "A. At

$125.00 an acre." On pages 98 and 99 of the Transcript, the witness Harry K. Brown testifies that on Saturday night, the 23rd day of September, 1911, he was present at a meeting with Miss Garwood and the agents who sold her the land. He testifies, "That night after dinner we met—at the meeting after dinner there were present Mr. Dike, Mr. Crane, Doctor Ramos and Miss Garwood and myself—five of us. We talked about what could be done with this land. We represented to Miss Garwood that this land was particularly adapted to alfalfa and dairy business and that there were 600 acres of it. Mr. Dike made those representations my best recollection is. He said that the land consisted of 600 acres of the very finest alfalfa land. It was stated to Miss Garwood by all three parties at that meeting that she could not obtain anything better in alfalfa than it was—than those 600 acres. There was nothing said about any of the land not being as good as some of the rest of the land. As far as I remember it was all represented as being uniformly of the finest kind, first class." Later, on page 99, the witness, in answer to the question as to whether the land was put up to her as a sale in gross or a sale at so much per acre, testified: "A. The whole amount at $125.00 an acre." Later, on the same page, in reply to a leading question, he said that it was put up to her and talked to her as $125.00 an acre. On pages 165 and 166 of the Transcript the plaintiff, Isabelle Garwood, testifies that she and Mr. Crane and Dr. Ramos and Mr. Bucholz went out to look at land, and that on the return trip to Sacra-

mento they, Crane and Bucholz, talked to her about the land that she afterwards bought. On page 166 she says: "Mr. Bucholz said, 'If you are buying alfalfa land, you ought to buy a dairy; I can sell you 600 acres of the finest land for alfalfa in this State at $125.00 an acre.'" That statement of Bucholz was binding upon the defendants, first for the reason that it was made in the actual presence of Mr. Crane, the authorized agent, without any dissent from him, and, secondly, Bucholz himself was an employe of Messrs. Crane and Dike, and, as a sub-agent, he actually received a part of the commission paid by the vendors. (See testimony of A. L. Crane, last two lines on page 117 of the Transcript, viz.: "Q. And you did pay a commission to Mr. Bucholz? A. Yes.".) On page 174 of the Transcript, the plaintiff testifies that she in company with Dr. Ramos and Mr. Dike and Mr. Brown were returning to Sacramento in an automobile, and that the conversation was concerning the land which she afterward bought. She testifies: "Q. What did they say about the land in Sutter County, the Scheiber Brothers' Land, with respect to sub-irrigation?" "A. They said that it was thoroughly sub-irrigated." "Q. Did they tell you any of it was not sub-irrigated?" "A. They said it was all sub-irrigated, and 600 acres of the finest alfalfa land in the State." "Q. Who told you that?" "A. They all told me." (See also page 172 of the Transcript.) On page 171 of the Transcript, the plaintiff testifies (speaking of Mr. U. L. Dike): "A. He said, 'The Natomas land overflows, and the Natomas people will

not sell their land under $250.00 an acre, they have got to stop that overflow, too'; and he said, 'You will get your land for $125 an acre and it is already stopped!" On page 176 of the Transcript, the plaintiff testifies: "And then I said, 'Well, wont you get them to take off the animals, I do not want the animals, I only want the land to cut up,' and Mr. Dike said, 'Do you suppose when you pay $125 an acre for 600 acres of land, which is exactly $75,000, do you expect to have an animal thrown in to an acre'?" On page 219 of the Transcript the plaintiff testifies: "It was represented to me that I could cut up 600 acres of the very finest alfalfa land, and that is what the farmers wanted." On pages 187 and 188 the plaintiff identified the circular which Messrs. Crane and Dike gave to her describing the land, and the circular was introduced in evidence, and marked "Plaintiff's Exhibit 5." A photogragh of the page of that circular, containing the item respecting the land in question, appears on page 433 of the Transcript. The land in question is indicated by the heavy ink lines on both margins. The item in the circular reads in part, viz.: "600 acres, in Sutter County. River bottom land, east bank of the Feather River, near Nicholaus. Is protected from overflow by levee. Under cultivation, mostly alfalfa, there being three hundred acres in alfalfa, balance adapted to growth of alfalfa, ——— The soil is deep rich sediment loam, and lies practically level. No irrigation is required for alfalfa." This circular, containing statements respecting the land, given to the vendee by the vendors' agents is

competent, relevant and material evidence. (See case of *Connecticut Mut. Life Ins. Co.* v. *Carson,* 172 S. W. 69, 186 Mo. 221, quoted at length in this brief in the argument to the point that all the representations made to the plaintiff were statements of fact upon which she could rely, etc.) Nowhere in the record are any of the above quoted representations in respect to the quantity and price of the land contradicted.

Now, the land was represented to the vendee to be free from overflow. See the statement in the circular, "Is protected from overflow by levee" (Tr., p. 433), and see testimony of plaintiff just quoted above in respect to statements of U. L. Dike.

On page 172 of the Transcript the plaintiff testifies: "Q. What did he say about it with respect to overflow? A. He said there was no overflow; he said that 'Your levee is built and you will get $5000 back, and the people whose levee is not built they have got to spend money but you have got nothing to pay, you will get $5000 and the Scheibers told me the same thing.'"

The complaint alleges (Tr., p. 6) "that the plaintiff visited the land on the 21st day of September, 1911, and that plaintiff while at said ranch inquired of said defendants as to the boundaries of said property, and asked them to tell her where said ranch extended to, and Morris Scheiber pointed to the levee on the East bank of the Feather River and called paintiff's attention to the same and stated that the Western boundary of said ranch ran along said levee northward to a

point near a white house and from there eastward along a certain fence, which he indicated, to a point beyond a grove of oak trees, which he also indicated, and from there in a general southerly direction, and thence, at right angles, in a Western direction to a levee." This allegation is sustained by the evidence. We ask the Court to read the testimony of the plaintiff on pages 168, 169, 170 and also on pages 206 and 211.

If the Court will read the plaintiff's testimony on those pages it will see that the defendants, themselves, lead the plaintiff to believe that the land was all of the character which the plaintiff could see from where she stood near the ranch house and that the levee constituted one of the boundaries of the tract. In particular do we call the Court's attention to the testimony of the plaintiff on page 206, where she says: "Q. You asked them to point out the boundaries? A. Yes. Q. What did they say? A. They said right along the green line to the white house, meaning their stable, running down that line to the trees and across from the trees up to the grove." On page 211 of the transcript plaintiff testifies: "and they said, 'There is nothing bad about the land, Miss Garwood, it is all good, clear level land like you are looking at.'" (This testimony, however, is contracted by defendants.)

Counsel for the defense have tried to argue from the plaintiff's testimony that they pointed the boundaries out as running on the other side of the trees, across the levee and that, therefore, it was her own

fault if she went away with the misapprehension that the levee was the boundary.

If the Court will read the testimony, however, on the pages which we have referred to, it will see that the plaintiff meant exactly what is alleged in the complaint, and which allegation we have herein quoted. That the defendants and their agent, Mr. Dike, lead plaintiff to believe that the levee constituted one of the boundaries of the land is plain when we read the testimony of Mr. U. L. Dike on pages 260 and 261 of the Transcript, where he says: "About the boundaries, we drove along the line of the property where the road followed the line and walked over to the line to places where it left the road and also pointed the boundary line by fences, *levee and river boundary.*" In any event, it is perfectly clear, in the light of all the testimony, which we have quoted in our brief, that the plaintiff had no idea that there was any land belonging to this particular tract outside of the levee.

On pages 186 and 187 of the Transcript the plaintiff says: "It was in the early part of February, 1912, that I was told that there was only 450 acres to the place." The defendants have stated in their testimony that the plaintiff asked them what the land on the outside of the levee was good for and that they told her that it was good for wood, but it does not appear from their testimony that they told her that that land outside of the levee belonged to their tract. It is plain from the testimony of Mr. Dike on page 262 that the plaintiff never went upon the levee. On

page 262 the witness Dike says: "I went onto the levee, but Miss Garwood did not."

Then on page 263 the witness Dike says: "We did point out the boundaries and mentioned certain fences which constituted the southeast and north boundaries and the river bank represented the west boundary." By the river bank he meant the levee; this is clear when we read his testimony on page 261, where he says: *"Levee* and *River boundary."*

Now, we will direct the Court to the testimony of Joseph Scheiber and we will respectfully ask the Court to read the testimony of said defendant as it appears on pages 393, 394 and 395 of the Transcript. The reading of that testimony will convince the Court that the defendant never told the plaintiff or advised her, in any way, that there was an absolute shortage to the land of 75 acres, that is, that there was that much land under the permanent bed of a navigable river, and it will also be perfectly clear from that testimony that they did not advise her that there was any land belonging to the tract outside of the levee. There is absolutely no place in the record where it appears that either defendants or their agents ever advised the plaintiff that there was any such amount of land as 25 per cent lying beyond that high embankment constituting the levee. It is perfectly clear that the plaintiff herself never knew that 25 per cent of the land lay outside of the levee, or, in fact, that there was any of the tract outside of the levee. On the contrary, it is clear that she went away from that

land with the idea that it was all to the south and east of the high embankment constituting the levee. Now, the question is, is she responsible, in view of all the circumstances of this case, for the misapprehension under which she bought the land? Does this deficiency amount to fraud or mistake such as to justify her relief? The defendants knew that there was a very large amount of land outside of the levee and a very large portion under the permanent channel. They knew that none of the land outside of the levee was of any value whatever other than a place to get wood. They admit themselves on page 397, where Joseph Scheiber testifies:

"Q. When you bought the land from the Pacific Mutual Life Insurance Company, did you consider that land west of the old levee of any particular value except for wood? You knew it could not be farmed, didn't you? A. Yes. Q. Did you consider it of any particular value except for wood? A. That is about all. Q. Its value was just as much when you sold it as when you bought it, was it not? A. Just as much. Q. You never used it for anything except for wood? A. Just for wood."

Now, should not the defendants have told the plaintiff that 25 per cent of the land lay outside of the levee and that fully one-half of that 25 per cent lay under the permanent channel of a navigable river? We will again quote from the testimony of Joseph Scheiber, page 395: "Q. Why didn't you show her how the land was just outside the old levee, Mr. Scheiber? A. She never asked me to go over there. Q. She

never asked you so you did not take her? A. Never thought of it; she did not ask me to go. Q. You did not tell her how much land there was over the levee? A. No. Q. You did not say how much? A. No."

We will again quote from the same witness on page 394, where he says: "Q. Do you know whether or not this woman knew about that land being gone when she bought the place? A. I don't know whether she knew that or not. Q. You did not point out to her across the river where there was no land? A. I pointed the lines. Q. She never went upon the levee? A. Not that I seen."

Before we close the discussion with reference to the representations which were made to the plaintiff concerning the character of the land, we wish to call the Court's attention to certain testimony given by the defendants to the effect that they told the plaintiff about overflow on the rear portion of the land. If the Court will refer to the next section of this brief, which is devoted to an explanation of the character of the land, it will see that the southerlymost 200 acres of the tract is of very low contour and subject to overflow from back water from the American and Sacramento Rivers and subject to complete inundation for many weeks at a time.

This land, previous to the reclamation work, was subject to overflow to such an extent that the raising of alfalfa on it was a commercial impossibility, because the alfalfa would be drowned out. Some of the defendants testified that they told the plaintiff that the water came up over the back land. This, we con-

tend does not excuse them unless they also told her that the overflow was such as to render the raising of alfalfa commercially impossible with the land unprotected by levees in the rear. The 200 acres complained of at the rear end of the tract are very low land and the water would back up from the American and Sacramento Rivers. According to the testimony of Mr. Peter and Mr. Ewen (see Tr., p. 124 and 225), the land would be covered with water for months at a time. By the testimony of Mr. Mulvany (Tr., p. 147), it will be seen that alfalfa could not possibly live on the land inundated for such periods of time. (See, also, Furlong's testimony, Tr., p. 235.)

It must be remembered that the plaintiff was there in September, generally the driest month in the year, and that there was no water on the land at that time. She was always told by the agents that the land was first-class alfalfa land. She was a person of no experience in land and was not dealing at arm's length with the defendants. Moreover, her agent was in the employ of the adverse party and the doctrine of *caveat emptor* has no application to this plaintiff. Their liability for the misrepresentation as to the overflow in so far as the back land was subject to overflow is not affected by their telling her what they say they did. In order to be absolved from liability, under the circumstances of this case, they should have told the plaintiff that the flooding of the back land was of such long continuing periods that the raising of alfalfa on that land was commercially impossible.

In closing this part of our brief, we will say that the plaintiff believed all that the defendants or their agents told her in respect to the land. On page 191 she testifies:

> "I believed implicitly every word that they said and what they said was exactly what they showed me in their book (referring to the circular, page 233 of the Transcript), and I believed everything, otherwise I would not have bought the place."

On page 196 the plaintiff testifies:

> "A. Doctor Ramos said he thought it was the best thing to buy, and pay in full price, and I said, 'all right if you think so.'"

THE QUANTITY, QUALITY AND VALUE OF THE LAND INVOLVED.

If the Court will look at page 435 of the Transcript, it will see a very good map of the land in question, surrounded by the neighboring farms. Page 435 is a photograph of defendants' Exhibit "J." A duplicate of page 435 is appended to this brief.

On the map, defendants' Exhibit "J," the land will be observed as the largest one of the tracts, and is the shaded portion running northwest and southeast through Section 13, and also embracing the northeast quarter of Section 24. The Court will also observe a narrower strip resembling a wing, or propeller blade, stretching away across the "cut-off" to the west of the northwest quarter of Section 13. The Court's attention is called to a rather thin line running from the little square representing the town of Nicolaus at the

upper and northerlymost portion of the map, and proceeding in a southwesterly direction, and joining the Feather River at the land marked "D. Donohue." The line crosses the land involved herein between the words "Isabelle" and "Garwood." This line represents what is called the old levee, and it was the only levee there at the time the land was sold to the plaintiff. All of that part of the tract which lays to the north or west of that levee is abandoned swamp land. In the early days of California the channel of the Feather River in that locality was much deeper than it is now, and levees were almost unnecessary. In the early days the river followed the bend indicated by the dotted lines, and marked "Old Channel." The description of the tract at that time followed the meanderings of the river around the bend to the sharp point at the west close to the word "old." By that description the tract actually did contain six hundred acres, or, to be exact, 609.9. As years went by, however, the river straightened its course at that point, and the levee was built along the course indicated on the map, and the narrow wing-like portion of the tract became, in time, the permanent bed of the river. In this way 150 acres of the tract were abandoned to the swamp, and about seventy acres of the tract were taken away completely. (Tr., 146 and 147.) By Section 2349 of the Political Code the Feather River is navigable as far as Marysville. By Section 830 of the Civil Code of California no one but the State can own land beneath a navigable stream. What land that there is to the north and west of the old levee is swamp

and heavy jungle, and full of holes, and is saturated with water for practically the entire year. That land is of no agricultural value whatever, and defendants' valuation experts themselves placed no value on it except for the wood that happened to be growing on it. The Court's attention is directed to a zig-zag line running northeasterly across the tract in the southeast quarter of Section 13 of the map appended to this brief. This line does not appear on the original exhibit; but it does appear on one of the other exhibits in the case. It is simply used here to indicate the dividing line between the land which is conceded to be as represented, and that portion at the southeasterly end of the land which is not as represented. The rectangular portion lying between the levee and the zig-zag line consists of about two hundred and fifty acres, and this portion is not mentioned in the complaint, it thereby being conceded to be as represented. All that portion lying south of the zig-zag line, consisting of about two hundred acres, is not as represented in that it is not river-bottom land, but on the contrary is a heavy clay with but a few inches of sediment on the surface. It is not sub-irrigated, and it is not commercially practicable to raise alfalfa on it without artificial irrigation. That portion of the land is also of very low contour, and at the time the land was sold to plaintiff those two hundred acres at the lower end of the tract were subject to overflow to such an extent that the raising of alfalfa was commercially impossible. Although the land was represented to the plaintiff as being free from overflow, she has been

compelled to expend more than twenty thousand dollars in reclamation assessments to keep the water off. (Tr., p. 187.)

By the testimony of H. H. Jones, a civil engineer, the land lying to the south and east of the levee consists of 450.365 acres. If the area of the tract, as computed by its original boundary lines, was 609.9 acres, that leaves 159.535 acres of worthless land outside of the levee. On page 146 of the transcript the witness Mulvany testifies:

> "There was land on that side years ago which is not there now. Probably about seventy acres, and that is in the bottom of the river. That is now in the bottom of the river."

On page 148 he again says:

> "During the past twenty-five years the river has worked south and covered about 70 acres, or more, of land of this particular property."

The Feather River, a navigable stream at that point having changed its course, and covered seventy acres of the tract, that portion of the tract was absolutely gone. (See Sec. 2349, Pol. Code, and Sec. 830, Civ. Code.) We thus see that the actual acreage which the plaintiff received was about 540 acres instead of 600 acres. But, while the actual shortage is only about 60 acres, the moral shortage is 150 acres, because there is not more than 450 acres which have any agricultural value. There were about 90 acres outside the levee, and although abandoned land, it was not actually under the river. On page 146 Mulvany testifies:

> "As to any land lying outside of the old levee,

that land in 1911 would be worth about $10 an acre for the timber that is on it."

On page 243 the witness H. W. Furlong, an agricultural engineer, testifies that the land lying to the northwest of the levee was valueless for agricultural purposes. On page 246 he says this land is *submerged* agriculturally. On page 397 the defendant Joseph Scheiber testifies that the land lying west of the levee had never been used for any purpose other than for wood, and was of no value except for wood.

All of the land lying outside of the levee was overflow land in the most extreme degree. In the winter time it would be completely covered by the rushing torrent of the Feather River. See the testimony of Mulvany on pages 148 and 149, and see, also, to the same effect, the testimony of Scammell on page 130 of the Transcript. See, also, plaintiff's Exhibit No. 1, and also other photographs of land lying to the west of the levee.

Now, as to the rectangular piece of land extending southeast from the levee through the heart of Section 13, and as far as the zig-zag line, we will state that that is the portion of the land which is not mentioned in the complaint. It consists of about 250 acres, and is conceded to be practically as the land was represented to the plaintiff. It is of comparatively high contour, and is not subject to overflow. It is river-bottom land; that is, it is sediment, and quite rich. It is sub-irrigated, that is, the water from the Feather River percolates through it to such an extent that alfalfa can be raised throughout the year without irri-

gation. If the Court should read the testimony of the various witnesses who testified in respect to the character of the land, it will find that this particular 250 acres of which we are now speaking is of the same general character as the land which borders the river at that point, that is, which extends back toward the east from the river channel. For instance, the northerly most piece on this map is the M. Meiss farm, next below is the Drescher place, then A. Kreig, then Redfield, then Scheiber Bros., then just below the land in question is the land of W. H. Saylor, and below the Saylor land is the Borgman place. All of those farms, for about three-quarters of a mile back from the river channel, are river-bottom land and sub-irrigated. We will now take up the last portion of the tract, viz., all that portion south of the zig-zag line. This portion consists of the northeast quarter of Section 24, and the triangular fraction of about 40 acres immediately above. This land is of a different character and formation entirely from the 250 acres last described. The scientific explanation seems to be this: The Feather River, in the course of centuries, has shifted its course to and fro, gradually cutting a basin through the clay sub-soil and replacing the clay with sediment. Along the immediate course of the river the sediment has accumulated from deposits made from time to time whenever the river would get high enough to overflow its banks. For this reason the land bordering the river channel, for a half mile or mile back from the river, is higher in elevation than the land farther away from the river. For this reason

land two or three miles away from the river may be submerged in the wet season, while the land immediately bordering the banks of the river will be high and dry. (See testimony in general of witness Furlong.) Now, the quarter section at the southerly end of the ranch, and the triangular fraction immediately above, is of this low-land character. In the rainy season it would be entirely submerged for many weeks at a time. (Tr., p. 124 and p. 225.) This would be fatal to alfalfa. (Tr., pp. 147 and 235.) The 200 acres in the south end of the land is not suitable for alfalfa. (See testimony of W. H. Ewen, Tr., p. 227.) The 200 acres at the southeast end of the tract is not sub-irrigated. (See testimony of H. W. Furlong, Tr., p. 233.) To the same effect see also the testimony of I. N. Scammell on page 128 and page 129. The rear portion of the Garwood land is not sub-irrigated. It is not alfalfa land; it is grain land. (See testimony of T. J. Mulvany, on page 145.)

For a most perfect illustration of how the soil type changes along the course indicated by the zig-zag line, we will call the Court's attention to the two photographs of plaintiff's exhibits 13 and 14 as they appear on page 436 of the transcript. On page 251, Furlong says: "That line observed in the picture is the line of demarcation between the alfalfa and the indigenous weeds. The alfalfa stops; the entire ground where the picture was taken and showing the line of demarcation is not alfalfa." On page 232, Furlong says: "The 200 acres at the southeasterly end of the Garwood place is not good alfalfa land;" and on page 233

he says: "That soil is not sub-irrigated." On page 237 he tells where he was on the tract when he took the pictures just hereinbefore referred to.

Now, in reference to the value of the 200 acres which we complain of at the rear end of the tract, Mr. Mulvaney, on page 146, says that it is worth $60 an acre; Mr. Furlong, on page 245, says that it is worth $60 an acre; Mr. Redfield, on page 414, also places the value at $60 per acre. However, some of the defendants' witnesses value it at more than twice that amount, and some of them actually go so far as to claim that that rear portion of the tract is sub-irrigated. In order to get at a proper estimate of the value of that rear land it will probably serve us the best to inquire as to what some of the neighboring lands of much better quality sold for at about the time of the sale to the plaintiff. If we turn to the photograph of defendants' exhibit "J" attached to this brief (see also Tr., p. 435), we will notice the land of W. H. Saylor adjoining the Garwood land on the west. Saylor's land is a triangular piece with the easterly-most point or angle ending where the lower portion of the Garwood land begins. By Saylor's testimony on page 142 we see that his land is all sub-irrigated with the exception of a small portion of the extreme easterly point. Now, on page 325 defendants' witness, John Borgman, says: "The Saylor land is *not quite* as good as the *best* land on the Scheiber ranch." Now, by the testimony of practically all of the witnesses, the sub-irrigation extends back from a half mile to a mile from the river. By looking at the

Saylor place it will be seen that it is all sub-irrigated with the exception of the small portion of the eastern point or corner. This in accordance with the testimony of Saylor, himself. Now, if we turn to page 404 of the transcript we will see that Saylor bought the land in the year 1909 or 1910 for $100 per acre.

There we have the very best possible evidence respecting the value of land in that vicinity. If Saylor bought a tract of 128 acres of good sub-irrigated land for $100 an acre at about the same time that the land in question was sold to the plaintiff, is that not some criterion as to the value of the inferior land lying to the east? Had the Court the time or the inclination to go through the testimony in its entirety in reference to land values in that vicinity, it would see at once that, had the plaintiff paid $100 an acre for the 250 acres uncomplained of, and $40 an acre for the 200 acres of poor land at the south end, and nothing for anything outside the levee, making a total of $33,000 for the entire tract as it is, she would simply be paying the fair, reasonable market value of the land.

DISCUSSION OF THE GENERAL FEATURES OF THE SALE.

On page 165 of the Transcript the plaintiff testifies: "Upon the occasion of my first visit to the office of that Company I told them that I had $6000 and that I wanted to buy some acreage. I told them that I was simply making inquiry and would not look at anything until there was a gentleman present, in whom

I had the greatest confidence, and who would advise me. This man was Dr. F. I. Ramos. I took Dr. Ramos to the office of the California Colonization Company, and introduced him to Mr. Crane and Mr. Dike, and told them that I was engaged to be married to him. On that day, the 20th of September, 1911, we went out to look at land." On the next page, 166, she says: "They stopped and left me in the car on the levee, and the three men went over to a saloon and stayed there from twenty minutes to a half hour, a good half hour, I think it was." When the journey back to Sacramento was resumed the land in Sutter County was mentioned to her for the first time. (Tr., pp. 166, 167.) On page 186 of the Transcript plaintiff testifies: that Ramos was a highly educated man, and that she had perfect confidence in him. On pages 103 and 104 of the Transcript the witness A. L. Crane testified: "I perfectly remember the circumstances of Miss Garwood coming to our place of business. She stated that she was going to bring a man to us, and that she would not look at anything before she had this man with her. She said she would not buy anything without his passing upon it. She afterward brought this man to our office. At the time she introduced him to us she said he was her agent; she said that he would be her adviser, and she also said her relations with him would be much closer; I believe she was to be married to him; she said she was engaged to him; she told me that. The first day we went out with Dr. Ramos we took him to Andros Island, down the Sacramento River. Mr. Bucholz,

Dr. Ramos, Miss Garwood and myself made up the party. On the way back Mr. Bucholz suggested that they look at the Scheiber Brothers Ranch. When we got back to the office, I introduced Dr. Ramos to Mr. Dike, who was familiar with the Scheiber Brothers' ranch." On page 165 the plaintiff testified that the date of this first trip, just mentioned—down the Sacramento River—was on Wednesday, the 20th day of September, 1911. On page 167 the plaintiff testifies: "They telephoned to Brown, and Brown replied that he would send the papers, but that he could not come until Saturday. The next morning Mr. Dike took us to this land—Mr. Dike, the chauffeur and the Doctor and myself made up the party." No part of the testimony herein quoted is contradicted. The plaintiff's testimony in respect to the date of the first trip which she and Dr. Ramos made with Crane or Dike to look at land is corroborated by the testimony of the witness Brown on pages 97 and 98. He says: "In September, 1911, while at Berkeley, I received a telephone communication from Mr. Dike, the Secretary of the California Colonization Company in Sacramento, with reference to the land. He telephoned to me from Sacramento on the evening of the 20th of September—Wednesday, September the 20th. He wanted me to come to Sacramento. He said he had a purchaser for the Scheiber ranch, and he wanted me to give them the details. I told them I could not come until Saturday afternoon, at which time I would be through with my work. I left on the 12:30 train, and met them at Dixon. They had a machine,

and we then went to Timm's Dairy, and then on to Sacramento." At the solicitation and advice of Ramos, on the 25th of September, 1911, only five days after they first went out to look at land, the plaintiff concluded to buy the land and pay the full price; and on that day she signed the contract, and put up $5000 deposit. On page 196 of the Transcript appears the following testimony, viz. (cross-examination by Mr. Miller): "Q. Now on the 25th of September, 1911, you concluded to buy this property, didn't you? A. Dr. Ramos said he thought it was the best thing to buy, and accept the pay in full price and I said, 'All right, if you think so.'" Then, on page 197, she says: "Q. How much did you pay them on the 25th of September? A. I paid $5000." At the top of page 197 she says: "Q. Did you at that time conclude to accept, pay the full price? A. I did pay the full price. Q. Did you at that time conclude to pay the full price? A. Yes, on the 25th of September." On page 180 the plaintiff testifies: "I put up $5000 for the land, the 25th of September, 1911." On pages 177 and 178 it appears by the testimony of the plaintiff that Ramos counseled and advised plaintiff to buy the land, and that he scolded her for hesitating. On pages 186 and 192 of the transcript it appears that the plaintiff was entirely without business training or experience. On page 138 of the Transcript appears the following testimony of Mr. Brown, in reference to the conversation held in Sacramento on Saturday night, September 23rd, at which time the plaintiff and Dr. Ramos and Mr. Crane and Mr. Dike and

Mr. Brown were present, viz.: "Mr. Macomber: Q. What did the plaintiff state about the land? A. She had no experience." On page 175 of the Transcript the plaintiff testifies: "I went very heavily in debt to buy this farm, I had only $6,000. I borrowed $32,000 in New York, and I had $39,500 mortgage in this country, $19,500 the first mortgage, and $20,000 the second mortgage." On page 169 of the Transcript, while speaking of her first and only visit to the land, before signing to purchase it, the plaintiff says: "Well, I had no idea of buying the ranch."

We believe that we have made it clear to the Court (but if we have not done so a perusal of the testimony certainly will) that, just as we stated at the outset of our brief, on Wednesday, the 20th day of September, 1911, the plaintiff in this action had no thought of investing anything more than $6000 in real estate, and that on Monday, the 25th day of September, 1911, just five days later, she signed the contract to purchase land to the extent of $75,000. This woman, with no business experience, put herself heavily in debt to buy this large property on only five days' consideration. Must there not have been some strong controlling influence to cause her to do such a thing? She did so by reason of the advice and persuasion of her betrothed, F. I. Ramos, a man who had the greatest possible influence over her, and the said F. I. Ramos so advised and persuaded the vendee to purchase the land for the reason that he was thereby enabled to put fifteen hundred dollars in his own pocket.

ARGUMENT IN RESPECT TO CORRUPTION OF PLAINTIFF'S CONFIDENTIAL ADVISER.

We will not take up the question of the corruption of Ramos. It is admitted in the answer of the defendants that Messrs. Crane and Dike did give Ramos $1500, but the allegation that Ramos was bribed is met by the insinuation that the transaction was simply a scheme framed up by Ramos and the plaintiff to get the land that much cheaper. There is not only no evidence that such was the case, but the evidence is perfectly clear that the plaintiff had no knowledge of the arrangement between Messrs. Crane and Dike and Dr. Ramos. We had no means of satisfactorily proving the corruption of Ramos except by calling as witnesses the very men who were guilty of the bribery, and who were friendly with the defendants. Dr. Ramos died in May, 1912, and we could get no information from him. (See Tr., p. 186.) If the Court will read the testimony of Mr. Crane and Mr. Dike in its entirety, it will see that each of said witnesses is ordinarily hostile, and in respect to the bribery of Ramos it will be seen that they are extremely hostile. They endeavor, continually to shift the blame from one to the other. Notwithstanding their evasions and equivocations, however, the Court will see, as clear as day, that they not only gave Ramos $1500, but they made the agreement to do so several days before the day the deal was consummated, that is, several days before Monday, the 25th day of September, 1911.

The Court will see by the testimony of both Crane and Dike that they did not tell Miss Garwood anything about the agreement with Ramos; and that in fact on the very day that she signed the contract to purchase she asked them to divide the commission with her, and they told her they would not do so, and at the same time made no mention of their existing agreement with Ramos. At that time, when the plaintiff was endeavoring to get a reduction in the price, and asking them to divide the commission with her, if the transaction with Ramos had been in good faith with the purchaser, and open and above board, would they not have talked about it and discussed it with her? Bribing an agent is not exactly a crime, but it is a trick, nevertheless, that almost every man, if guilty of it, would prefer to keep secret. If the agreement to divide the commission had been made with Miss Garwood, by and through F. I. Ramos, acting as her agent, is it not morally certain that Mr. Dike, in his deposition would have so testified? By actual count, Mr. Dike, in his depositions, has stated more than a dozen times that the agreement was made with *F. I. Ramos,* and the commission was actually paid to *F. I. Ramos.* Not once in all the times that he stated the fact has he even so much as hinted that the agreement was made with Miss Garwood, by and through F. I. Ramos acting as her agent. The testimony of the witness Dike is perfectly clear to the point that they agreed to, and did, give to *F. I. Ramos* a part of their commission. The witness Crane testified that when they gave the $1500 to Ramos it was by a check

payable to F. I. Ramos; and he tries to excuse himself by saying that Ramos was the agent of the vendee. He says that it was his *"impression"* that she knew all about it. On page 182 the plaintiff testified concerning her first hearing of a commission being paid to Ramos, which was long after she had bought the property. The plaintiff testified on pages 183 and 215 that Ramos always denied that he had received any commission. On page 183 she says: "Q. When Dr. Ramos arrived, state what happened. A. He was very indignant. I said, 'Do you know that Mr. Brown accuses you of having received a commission?' He said, 'What and you sat and listened to him, you should have kicked him out of the house; would I listen to anybody say anything against you?'" On page 215 of the transcript the plaintiff testified: "Q. When Mr. Brown told you that did you go to the California Colonization Company or anybody else to ascertain whether or not they had actually paid the commission? A. I did not believe it, that was the end of it; I did not believe it." On page 257 of the Transcript the following questions and answers appear as quoted from a former deposition given in the state case, viz.:

"Q. By the way, you were paid by Scheiber Brothers for making the sale?

"A. Yes sir.

"Q. Your company paid Mr. Ramos some money?

"A. Yes, sire.

"Q. How much? A. Fifteen hundred dollars.

"Q. Out of your commission? A. Yes sir.

"Q. Why was that paid?

"A. Because he demanded it; he wouldn't let the sale go through unless we paid him.

"Q. What did he say about it? A. He couldn't come out there and work for his health; he would have to have something."

The witness, U. L. Dike, admits that those questions were put to him, and those answers given by him, and, on the following page, 258, he states that that testimony is substantially correct. On page 264 of the Transcript the witness, U. L. Dike, admits that he never said anything to Miss Garwood about paying a commission to Ramos until after the death of Ramos. (Ramos did not die until the following May—Tr., p. 186.) When Dike was asked why it was that he did not tell Miss Garwood of the payment of the commission to Ramos, he answered (see page 264 of the Transcript): "A. There was no reason for keeping the knowledge from her, except the usual reason that agents do not discuss division of commissions with principals." On page 273 of the Transcript Mr. U. L. Dike testifies: "When Mr. Crane told me of the agreement to divide the commission with Dr. Ramos I protested and I objected. Then Dr. Ramos showed me a card signed by Mr. Crane, the president of the company, agreeing to give Dr. Ramos one-half of the commission and when he showed me the card I consented. I don't know when this card was signed by Mr. Crane." As showing how inconsistent their testimony was, we will quote from the testimony of A. L. Crane, on page 115 of the Transcript, viz.: "I gave Dr. Ramos that card

when he came from the little office where he had been conferring with Miss Garwood, and told me they would not take the property unless I divided the commission. So we held a little meeting, Mr. Dike, and myself; Mr. Green was absent. We passed a resolution authorizing a division of the net commission, and then he asked for a verification, and we wrote it out on a card, as I remember it. We never tried to conceal the division in commission. Q. Did you ever tell Miss Garwood anything about it? A. No, sir." Then, on page 116, Crane testifies: "Q. Before the money was paid he made the demand? Q. He made the demand before the money was paid? A. Several days before. My impression was that Miss Garwood knew all about it. Q. That is all right about that part of it. He made the demand for the division and the demand was acquiesced in by you some days previous? A. Some days previous, because that was when they had agreed to take the property. Q. As a matter of fact, the agreement for a division of the commission was made some days prior to the date this $5000 was paid? A. I think it was." Now, on page 110 of the Transcript, we find this testimony, viz.: "Q. Mr. Crane, the check that you gave Dr. Ramos the time he handed you the $5000, as you hereinbefore testified, that was made out to Dr. Ramos? A. Yes, sir, Dr. Ramos. Q. And the check he gave you was made out by Miss Garwood? A. Miss Garwood's check. We talked with Miss Garwood at the office of the California Colonization Company. She came in frequently." Now, look at the testimony

of the plaintiff on page 176, where she says: "'Well, wont you get them to take off the animals, I do not want the animals, I only want the land to cut up,' and Mr. Dike said, 'Do you suppose when you pay $125 an acre for 600 acres of land, which is exactly $75,000, do you expect to have an animal thrown in to an acre?' Those were his words. Q. Who said that? A. Dike. Q. When? A. On Monday morning, when he said he would not take off the grain. Then I said, 'Wont you divide your commission with me because I really can't spend so much money,' but he said, 'no,' 'he never divided commissions with anybody' ". Here we see the plaintiff importuning the agents to divide the commission with her, on the very day that she signed the contract and put up the $5000 deposit, and they refuse, and stated to her that they never divide commissions with anybody. What does that mean? Only one thing—that they had made a secret agreement with Ramos some days prior, and they were purposely withholding the knowledge from her. Why did they refuse to divide the commission with her? Simply because they had already promised to divide it with Ramos, and they couldn't split it more than once. In the light of this reasoning, Mr. Crane's *impression* that she knew all about it falls to pieces completely. On page 180 and page 181 of the Transcript the plaintiff testifies that she never had any agreement with the agents for a division of the commission, and she also states that she never knew or heard of Ramos receiving any commission until

long after she bought the land, when Mr. Brown came and told her about it.

At this point it might be well to quote the testimony of the plaintiff on page 191, where she says: "Dr. Ramos and Mr. Crane were very chummy, they said they liked each other very much. They spent a portion of their time in the bar opposite the hotel. I used to see them going there. I saw them go in and out of the bar, and the Doctor told me they had been in the bar."

On page 269 of the Transcript U. L. Dike testifies: "Q. Did you tell Miss Garwood Ramos wanted fifteen hundred dollars, and you agreed to give him fifteen hundred dollars? A. No, sir." Then on page 268 appears this testimony, viz.: "Q. When did he first ask you for money? A. He never asked me for money at all? Q. Whom did he ask? A. Mr. Crane. Q. And did Mr. Crane tell you about it? Did he ever talk to you about money? A. Yes. Q. What did he say to you? A. He said that he gave Mr. Ramos a statement of the acres and that he would divide the commission with him. Q. For what? A. If they bought the property. Q. You knew Miss Garwood was buying the property, didn't you? A. We supposed she was. Q. Don't you know that you made a contract with her? A. Yes, but that was later. That wasn't the time we made the agreement with Doctor Ramos." Here we see the agent trying to excuse his action in bribing the plaintiff's agent by saying that he had entered into the agreement to give Ramos a commission before the contract was con-

summated with Miss Garwood. As a matter of law, it makes no difference when they made the agreement to divide the commission with Ramos: they knew at the time that he was the confidential agent and adviser of the plaintiff, and that she contemplated purchasing some land from them, and that she was bringing Ramos to them so that he could advise her as to what to buy. And here we see the attorney, in a manner, chiding Mr. Dike for giving money to Ramos, and that is the way he attempts to excuse himself. Is it not morally certain that if there had ever been any suggestion that this $1500 was paid to Ramos for Miss Garwood, that he would have urged the point then and there, instead of saying what he did? Mr. Crane says that it was his *impression* that Miss Garwood knew all about the transaction. That simple statement establishes conclusively that the arrangement was made with Ramos individually. The thought that the arrangement to divide the commission was for the benefit of Miss Garwood existed in his mind as a mere *impression.* In the first place, in the light of Mr. Dike's testimony, it was impossible for him to have had that impression. In the second place, there was absolutely no ground for such an impression, and he had no right to it. So long as his knowledge in that regard existed in his mind as a mere impression, it was his duty to assure himself positively by advising Miss Garwood immediately. In applying the law to this situation, with regard to the moral requisite of the case, the court should hold it to have been the duty of defendants'

agents to fully advise the plaintiff of what they had done just as soon as they had made the agreement with Ramos—especially so in this case, where there was every possible opportunity for their so doing. According to the testimony of Crane, she was in their office frequently. (Tr., p. 110.) And especially so in this case, as in this case, although the plaintiff introduced Ramos to them as her future husband, and one in whose judgment she would rely upon, nevertheless there is absolutely nothing in the record to show any power, authorization or authority upon the part of Ramos to make a contract, or to receive money for the benefit of Miss Garwood. In other words, while he was her confidential adviser in respect to selecting the land, there was no agency established in respect to his receiving moneys or making contracts. In this case defendants' agents had no authority to give Ramos any money for the plaintiff, and Ramos had no authority to receive any money for the plaintiff, and there was no authority for any contract or agreement to be made with Ramos. Under these circumstances, and under all the facts of this case, if there was an agreement with Ramos, or something said to Ramos, in respect to a division of the commission, it immediately became the duty of Messrs. Crane and Dike to at once advise plaintiff of their action, and, they not having done so, it must be presumed that the intelligence was purposely withheld from her. If this were not the law, parties could bribe agents with impunity; liability could always be avoided upon the defense that they thought

the principal was to be the beneficiary. In a case of this kind, where it is established that money is secretly paid to a person in confidential relation, the burden is overwhelmingly cast upon the defendants to show that the transaction was in good faith. But it is not necessary to argue that the giving of this money to Ramos amounted to bribery as a question of law; the evidence clearly establishes it as a fact.

Although in this case the bribery of the plaintiff's agent is established as a matter of fact, nevertheless, in the event of a new trial being had, it would be extremely desirable to have it settled as a matter of law. Our contention in respect to the point involved is this: That where, as in the case at bar, a party is the agent and confidential adviser of a person for one certain purpose only, but not to receive money, and it is proved that the agent receives money from the adverse parties in interest, and it is not beyond the power of the adverse parties in interest to advise the agent's principal of the fact that they had given him money, it thereupon becomes their duty to so advise the principal, and their failure to do so amounts in law to an improper and corrupt influencing of the agent. That this is sound doctrine we do not believe can be disputed.

SHORT OUTLINE OF THE LAW AND FACTS IN GENERAL.

Plaintiff is, and was, at the time this action was commenced, a citizen of the State of New York. (See plaintiff's testimony, Transcript, pp. 165 and

191, 223 and 224.) It is established by undisputed evidence that the plaintiff thought she was getting 600 acres of land. It is clear, as we have shown by undisputed evidence, that she got no more than 450 acres which were of any agricultural value. That leaves a shortage of 25% from what she supposed she was to get. It is true that the *actual* shortage is only about sixty acres, that is the 70 acres which according to the undisputed testimony of Mulvany lay under the permanent channel of the river, when taken from the 610 acres which the tract was supposed to originally contain, leaves 540 acres, the actual shortage therefore being 60 acres. But, although the actual shortage is only 60 acres, the moral shortage is 150 acres, there being 90 acres of unusable land outside the levee. If the land outside the levee is valueless it makes no difference whether it is actually under the river or not. The defendants argue that this sale was a contract of hazard—that she took the land just as it was, on a gamble that it might contain 600 acres or that it might contain less. By the facts of the case, and the law as it is cited in our "Argument" to the point that the sale was by the acre and not in gross, it is plain that their position can not be maintained. In support of their position counsel for the defendants cite the case of *Board of Commissioners* v. *Younger,* 29 Cal. 178, 179. That case, however, is antiquated and barbarous law, and has no place in an enlightened jurisprudence. But be that as it may we are in no way affected by that case. Practically all of the old cases of the character of *Board of Commissioners* v. *Younger* are careful to

state that the harsh doctrine does not apply where there are any confidential relations. The case of *Board of Commissioners* v. *Younger,* itself, calls attention to it at least two or three different times in the course of the opinion. In view of the bribery of plaintiff's agent, Ramos, their chief case has no application here. And then again, even in the absence of a confidential relation, the doctrine of *Board of Commissioners* v. *Younger* does not apply where the person wronged is without experience in matters pertaining to the transaction. *Board of Commissioners* v. *Younger* was distinguished in the case of *Watson* v. *Molden* (Idaho, 1905), 79 Pac. 506, wherein relief was granted for false statements as to water rights and irrigation of land made to a person unfamiliar with such matters. We will not stop to cite authorities here; we will leave them to the end of the brief; and the Court can find what it desires in the way of law under the various headings as they can be readily found in the index. By many well considered and very recent cases, the following propositions are settled law, viz.: The defendants are liable for all instrumentalities used by the agents in effecting the sale, and should have asked the agents or the purchaser as to what representations had been made before they consummated the deal. And this is true even though they had never authorized the agents to act for them in getting a purchaser. It is sufficient if they simply accepted a purchaser brought in by an unauthorized agent. See, in this brief, "ARGUMENT TO POINT THAT DEFENDANTS ARE LIABLE FOR ALL INSTRUMENTALITIES USED BY

AGENTS IN EFFECTING SALE." All the statements concerning the land made verbally by the agents and in their circular were statements of fact, and could be relied upon by the purchaser. See, in this brief, "ARGUMENT TO THE POINT THAT ALL REPRESENTATIONS MADE BY AGENTS WERE STATEMENTS OF FACT WHICH PLAINTIFF COULD RELY UPON." Sales of this character are always to be regarded as by the acre, unless the contrary is clearly established. A contract of hazard can be established only by the clearest and most convincing evidence. See, in this brief, "ARGUMENT ON PROPOSITION THAT SALE WAS BY THE ACRE AND NOT IN GROSS." The relationship between Ramos and the plaintiff was confidential in character! See authorities cited under that head in this brief. The suit brought in the state court, and afterward abandoned by the plaintiff by reason of her fear of local prejudice, is no bar to this action. See authorities cited under that head.

At the time the contract of sale was signed by plaintiff and defendants they met at the office of an attorney in Sacramento, who, it seems, according to his own testimony, acted in a sort of mutual or neutral capacity in preparing the contract of sale. The plaintiff, a woman of no business experience, testifies that she thought he was her lawyer. He says that he acted for both sides. The defendants testify that when they met at the office of the attorney the plaintiff asked them about the acreage, and they told her that "The deed calls for 600 acres, more or less, and they never had it surveyed, and they sold it the way they bought

it." The plaintiff denies this, but we will not argue the question. We will assume the facts to be against the plaintiff, that is, we will assume that the defendants actually did say to the plaintiff "We bought it as 600 acres more or less, and we never had it surveyed, we sell it as we bought it." The question now is, "Does that statement, under all the facts and circumstances of this case, make the sale one of hazard for the plaintiff?" The plaintiff had no experience. If they told her that they never had it surveyed, would that not be leading the plaintiff to believe that they were satisfied that it contained fully 600 acres? Their statement to the plaintiff that they never had it surveyed would be equivalent to a statement to her that they had no doubt as to the full acreage that the deed called for. That is one aspect of the case. But there is another aspect of even deeper significance. They said that the deed called for 600 acres. They knew that in the 600 acres mentioned in the deed there was more than 25% of the acreage outside of the levee. They knew that there was 70 acres, or more, under the river channel, and they know that, in addition to the land under the channel, there was 90 acres outside of the levee which was a swirling torrent during the winter months, and a useless expanse of sand, gravel, or jungle during the rest of the time. With that guilty knowledge on their minds are they to be allowed to come into this Court and say that the purchase by the plaintiff was a gamble—that she stood to get 600 acres or less than 600 acres? When asked why they did not show the plaintiff the land on the outside of the levee, Joseph

Scheiber answered: "A. I never thought of it; she never asked me." (See testimony of Joseph Scheiber, Transcript, p. 395.) We again ask the Court to read the testimony of defendant Joseph Scheiber, on pages 393, 394 and 395 of the Transcript. By the rule laid down in the case of *Connecticut Mutual Life Ins. Co.* v. *Carson,* 186 Mo. 221, 172 S. W. 69, quoted from at length in this brief, the words and representations of the agents are put into the mouths of the vendors, and, after telling the defendant that the land was free from overflow, in order to establish a contract of hazard against her, they will be compelled to show that they took every precaution to make her understand the situation in reference to the 90 acres of overflow land outside of the levee. The evidence is absolutely undisputed that the land was represented to the plaintiff as being "free from overflow," and it is undisputed that she never did know anything about it until February, in the following year. Now, the question is, "Who is to blame for her want of knowledge concerning the actual conditions of the land?" On the one hand we have a woman, absolutely ignorant of farming, agriculture, or farm land, and ignorant of business dealings of all kinds, and relying upon a man to whom she was engaged to be married, and in whom she had every confidence, and he receiving $1,500 as a stipend for inducing her to buy the land. On the other hand we have a number of men, all of experience in the matters pertaining to the land and its value and character, and complete knowledge, or immediate means of complete knowledge, in reference to this particular

land. It is well settled by the many cases which we have cited under the various heads in this brief that ignorance upon the part of either the principal or the agent is no defense in an action of this kind. Practically all the cases cited in our argument to the point that the sale was by the acre and not in gross, state that the words "more or less," following the number of acres in a deed are of no particular significance as importing a sale in gross. If the words "more or less," when written in the deed, mean nothing other than the small variations resulting from inaccuracies in the surveying instruments, could they have any greater significance when spoken verbally? After agreeing upon the value of $125 an acre, is there anything in the words they claim to have spoken in reference to "more or less" which would take away their moral or legal obligation to refund the purchaser her money to the extent the land fell short?

ARGUMENT ON PROPOSITION THAT SALE WAS BY THE ACRE AND NOT IN GROSS.

Plaintiff's contention is that she purchased the land involved in this controversy, as 600 acres of first-class alfalfa land. Her contention is, that the sale was a sale by the acre. Defendants contend that it was a sale in gross; that she took the ranch as it was, and the fact that she got only 450 acres of land instead of 600 acres, is not a circumstance entitled to consideration. If we attempted to quote from all of the cases which we find upon this disputed question, our brief would cover many volumes. We will, therefore, confine our-

selves to what we consider to be the best cases. It is well settled that sales in gross or contracts of hazard, as they are sometimes called, are not favored in law, and in order to establish a contract of hazard, the defendant must do so by the clearest and most convincing evidence for the reason that every presumption is against him. The authorities hold that when a dispute arises as to whether or not a sale was by acreage or in gross, the deed and other contract papers involved are not conclusive evidence as to the intention of the parties, but that all of the facts, incidents and circumstances having in any way to do with the transaction or tending in any way to shed light upon it, are to be taken into consideration. Thus, for instance, the character of the land, what it was to be used for, is a factor to be considered in determining whether or not quantity influenced the sale. Also the proportion of the value of the land to the improvements thereon, is held to be another factor to be considered in determining it. If the price paid is an equal multiple of the number of acres, this also is a circumstance which the court will take into consideration; as for instance in this case, the purchase price paid was $75,000; the number of acres represented was 600; 600 into $75,000 goes 125 times, that circumstance tends to show that the sale was made upon a basis of $125 per acre. The fact that the deed or other contract papers contained the qualifying words "more or less" immediately after the number of acres given, is a circumstance held to be of no consequence as arguing a sale in gross, for the reason that the words "more or less" have been con-

strued, by the courts, as being used in precaution against the reasonable percentage of error due to the mechanical inaccuracies of the surveying instruments and reckoning. Inasmuch as the percentage of error in surveying should be but a fraction of 1%, the words "more or less", cease to have any significance in a case of this kind. Many cases make the statement that where a parcel of land is sold by metes and bounds, that that circumstance is an incident tending to show a sale in gross. That circumstance, however, is exceedingly trivial as the Court well knows that in practically all sales of real estate, either farming or city, the description of the land sold is by metes and bounds. Any other form of description would have to be of a character analogous to buying a piece of cloth in a dry goods store, as where a customer at the counter says, "Give me five yards of that", and the clerk cuts him off a specified number of yards. Real estate is rarely sold in that manner, especially farms, and it is too obvious to argue that in farming land the quantity is always a governing factor. We will hereinafter cite cases however, which take this view point; that is, that although by all the title papers, the description being by metes and bounds, and followed by the words "more or less", the sale is held to be technically in gross, yet in fact by the acre. All the cases hold, as we have said before, that all the facts and circumstances of the transaction are to be brought in to shed light on the question, and all verbal representations by principal's agents are to be taken into consideration, and the cases are uniform to the point that even though, the sale is to be regarded as one in gross, nevertheless, if there

have been untrue representations as to the quantity of land, even though such representations have been innocently made, the purchaser is entitled to redress.

We will now quote from the case of *Lang* v. *Merbach et al.,* 105 N. W. 415, wherein the Court says:

> "There is no question here as to the agent's authority, and whatever statements he made as to the acreage bound his principal. Respondent's right to recover is not limited by the fact that in the earnest money contract, and in the deed, the premises were described as containing 382 acres, more or less. The basis of this action is that the owners, through their agent, fraudulently represented the amount of acreage to be 382 acres, when in fact it was about 44 acres less. Considering the character of the premises, respondent was not called upon to ascertain for himself the exact amount of acreage, and under the circumstances was justified in relying upon those representations."
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> *Lang* v. *Merbach* (Minn. 1905), 105 N.W. 415.

We will now quote from the case of *Paul* v. *Swears,* 122 N. Y. S., 742, in which the Court says:

> "The fact that the sale of this farm may have been in bulk and not with reference to the exact acreage does not affect this question. If there had been no fraud in this transaction, perhaps the defendant would have no grievance on the theory that he purchased the farm as an entirety and without reference to the exact number of acres which it contained. But the authorities holding that proposition do not sanction a fraud or render a vendee immune from relief when he has been made a victim thereof, even though the sale was in gross rather than by the acre. This was expressly held in *Thomas* v. *Beebe,* 25 N. Y. 244; the headnote reading as follows:
>
> " 'When the fraudulent representations relate to

the quantity of the land, it is immaterial whether the sale is in gross or by the acre.' "

Paul v. *Swears,* 122 N. Y. S. 742.

We will now quote from the case of *Landrum & Adams* v. *Wells,* 122 S. W. 215, wherein the Court says:

"The shortage of 53 acres shown in this case constitutes a deficit of more than 33 1-3 per cent. Such a loss is excessive and shows that it could not have been intended or contemplated by the parties that it would or could occur. So, whether the sale of the land was in gross or by the acre, or the loss occurred through the fraud or mistake of the vendors, certainly no court of equity should refuse relief upon such facts as are here presented. In numerous cases relief has been granted by the courts where the deficiency was as low as 15 or even 10 per cent. *Shelby* v. *Smith's Heirs,* 2 A. K. Marsh. 513; *Smith* v. *Smith,* 4 Bibb, 81; *Hazlip* v. *Austill,* 4 Ky. Law Rep. 982. As said in *Young* v. *Craig,* 2 Bibb, 270, and quoted with approval in several later decisions of this Court: 'The equity of such case must depend upon its own peculiar circumstances. The relative extent of the surplus or deficit cannot *per se* furnish an infallible criterion; but the conduct of the parties, the date of the contract, the value, extent and locality of the land, the price, and other nameless circumstances, are always important and generally decisive.' *Harrison* v. *Talbot,* 2 Dana, 258; *Hall* v. *Ely,* 76 S. W. 848, 25 Ky. Law Rep. 954; *Collins* v. *Stodghill,* 79 W. W. 185 Ky. Law Rep. 2015."

Landrum & Adams v. *Wells* (Ky. 1909), 122 S. W. 215.

We will now quote from *Benson* v. *Humphreys,* 75 Va. 196, wherein the Court says:

"Every sale of real estate where the quantity is referred to in the contract and where the language of the contract does not plainly indicate that the sale was intended to be a sale in gross must be presumed to be a sale per acre. * * * The language 'more or less' used in contracts of sale of land, must be understood to apply only to small excesses or deficiencies, attributable to variations of instruments of surveyors, etc. When these terms are used it rather repels the idea of a contract of hazard and implies that there is no considerable difference in quantity. * * * The burden of proof is always upon the party asserting a contract of hazard for the presumption always being in favor of a sale per acre, a sale in gross, or contract of hazard, must be clearly established by the facts."

Benson v. *Humphreys,* 75 Va. 196.

We will now quote from the case of *Harrell* v. *Hill,* 68 Am. Dec. 208, in which the Court says:

"We are inclined to hold to the doctrine first stated, *i. e.,* that the effect of the words, 'more or less', added to the statement of quantity, can only be considered as intending to cover inconsiderable or small differences, the one way or the other, and particularly so in the case before us, for the reason that the contract of the defendant with the complainant in regard to the land was and is an executory one, being yet in *fieri,* the general opinion being in such case that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words 'more or less' or 'by estimation': See 1 Sugd. Vend. 433, note 2; *Hill* v. *Buckley,* 17 Ves. 395."

Harrell v. *Hill,* 19 Ark. 102, 68 Am. Dec. 208-212.

We will now quote from the case of *McComb* v. *Gilkeson,* 135 Am. St. Rep. 946, in which the Court says:

> "It is well settled that courts of equity do not favor contracts of hazard, and that every sale of real estate, where the quantity is referred to in the contract, and the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale by the acre. The presumption against contracts of hazard can be effectually repelled only by clear and cogent proof, and the burden is always upon the party asserting a contract of hazard to adduce facts which clearly establish that assertion. Where the parties contract for the payment of a gross sum for a tract of land upon the estimate of a given quantity, the presumption is that the quantity influenced the price to be paid, and that the agreement was not one of hazard. Whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract and all the facts and circumstances connected with it, but in the interpretation of such contracts the courts, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre, wherever it does not clearly appear that the land was sold by the tract and not by the acre: *Berry* v. *Fishburne,* 104 Va. 459, 51 S. E. 827; *Watson* v. *Hay,* 28 Gratt. 698. * * * A deficiency of about ten acres in a tract of land represented to contain two hundred and forty-five and one-quarter acres is not the small deficiency which the rule mentioned attributes to a variation of instruments. It is a substantial loss, and shows that a mistake has been made in estimating the quantity. There was no laches on the part of appellant in asserting his claim for abatement of the purchase money. He did so promptly after discovering the shortage. The suit was still pending

and all the parties were before the court and a large part of the purchase money unpaid. *Watson* v. *Hoy,* 29 Gratt. 698. * * * As to the measure of damages in a case like this the general rule of compensation or abatement is according to the average value per acre of the whole tract, unless particular circumstances require a departure from that rule." *Watson* v. *Hoy,* 29 Gratt. 698.

McComb v. *Gilkeson,* 110 Va. 406, 135 Am. St. Rep. 946, 947, 948.

We will now quote from the case of *Emerson* v. *Stratton,* 58 S. E. 577, wherein the Court says:

"While contracts of hazard are not invalid, they are not regarded with favor by courts of equity. Every sale, therefore, of real estate, where the quantity is referred to in the contract, and when the language of the contract does not plainly indicate that the parties intended a sale in gross, must be presumed to be a sale by the acre. *Berry* v. *Fishburne,* 104 Va. 459, 51 S. E. 827; *Hull* v. *Watts,* 95 Va. 10, 27 S. E. 829."

Emerson v. *Stratton* (Virginia, 1907), 58 S. E. 577.

We will now quote from the case of *Wright* v. *Commonwealth,* 72 S. E. 106, wherein the Court says:

"It satisfactorily appears, we think, that the tract of land described in the deed as containing 90 acres only contained 83 acres. It further appears that the sale was by the acre, and not in gross; for every sale of land where the quantity is referred to in the contract is presumed to be a sale by the acre, unless the language of the contract plainly indicates a sale in gross, and this presumption can only be overcome by clear and cogent proof."

Hall v. *Graham* (Virginia, 1911), 72 S. E. 106.

We will now quote from the case of *Pack* v. *Whitaker,* 65 S. E. 498, wherein the Court says:

> "On the principal question, whether the sale was by the acre or in gross, there is great conflict in the oral testimony; but both the written contract of sale and the conveyance describe the land as containing '50 acres more or less,' and such language constitutes a sale by the acre, unless it plainly appears that a sale in gross was intended."
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> *Pack* v. *Whitaker* (Virginia, 1909), 65 S. E. 498.

We will now quote from the case of *Salyer* v. *Blessing,* 152 S. E. 277, wherein the Court said:

> "When a vendor in selling land represents to the vendee that the tract proposed to be sold contains a designated number of acres, and the vendee relies on these representations and makes his purchase on the assumption that they are true, he may, upon discovering that there is a deficit in the number of acres, bring an action to recover the amount due on account of the deficit, notwithstanding the sale was in gross or of a boundary of land, if the discrepancy is sufficient in quantity to justify a recovery.
>
> "In this state the rule is that, where there is a sale in gross and not by the acre, if the discrepancy is more than 10 per cent, a suit may be maintained to recover the amount due. *Page* v. *Hogan,* 150 Ky. 726, 150 S. W. 801. Here the deficit is more than 30 per cent, and so, although the sale may have been of a boundary and not by the acre, the vendee is entitled to recover the difference between the number of acres actually conveyed and the number of acres paid for. This action is not based on any warranty in the deed, but upon the representations and statements made by the vendor, relying on which the vendee made

the purchase. That such a suit may be maintained is well settled. In *Biggs* v. *Lexington & Big Sandy R. R. Co.,* 79 Ky. 470, the court said: 'The general principle of law authorizing an action for compensation for a material deficit in land sold under a mistake as to the quantity was long since well established; but the right of recovery greatly depends upon the nature of the purchase, the circumstances, knowledge, and conduct of the parties. This right of action is based upon the contract which the law implies as the result of justice and reason and growing out of the mutual mistake of innocent parties. * * * Neither of the deeds contains any warranty of quantity. The lands are described in them by metes and bounds, and "supposed to contain in the whole 3,700 acres, be it more or less." * * * But this court has too often held that the remedy for a deficit, where such deeds as these exist, is based on an implied *assumpsit* to refund the money paid by mistake that results from ignorance, accident, or confidence.' In *Dye* v. *Holland,* 4 Bush 635, the court said: 'Although the sale of the land to the appellant was not by the acre, but in gross, the deficiency proved of 41¾ acres in the tract, which was supposed to contain 200 acres, was beyond the range of ordinary contingency, and such as would in proper time have entitled the appellant to relief, on the ground that he acted, in purchasing the land, under a palpable mistake as to its true quantity.' To the same effect are *Nave* v. *Price,* 108 Ky. 105, 55 S. W. 882, 21 Ky. Law Rep. 1538; *Crane* v. *Prather,* 4 J. J. Marsh. 75; *Harrison* v. *Talbot,* 2 Dana, 258; *Boggs* v. *Bush,* 137 Ky. 95, 122 S. W. 220."

Salyer v. *Blessing* (Ky., 1913), 152 S. W. 277.

We will now quote from the case of *Yates et al.* v. *Buttrill,* 149 S. W. 348, in which the Court says:

"The testimony of the surveyor justifies the verdict that there was a shortage within the established boundary lines, and, of course, in such a case it cannot be said the value of the shortage should be determined by the value of adjacent lands lying in one direction rather than another, if indeed the value of adjacent lands is admissible at all. We think the charge quoted above submitted the correct measure of damages. This is perhaps the most serious question in the case, but we are of the opinion that where, as here, the sale is by the acre, or even in bulk and the shortage is material, the recovery for a general shortage should be proportioned to the estimated acreage or at the agreed price per acre."

Yates et al. v. *Buttrill* (Tex., 1912), 149 S. W. 348.

We will now quote from the case of *Rathke* v. *Tyler,* 111 N. W. 436, wherein the Court says:

"But where the sale is by the acre the differences presumed to have been contemplated by the parties are only such as are due to the errors incident to measurements by different surveyors and the variation in the instruments used, and the words 'more or less' in the deed are treated as words of safety or precaution merely, and intended to cover but slight and unimportant inaccuracies. * * *

"The result of their examination is that much depends on the circumstances of each particular case, though the decisions may be separated into two general classes treating of (1) sales by the acre and (2) sales in gross or by boundaries. Again, sales by the acre may be subdivided into (1) those where in this is expressed in the conveyance and (2) those wherein this was not so expressed, but such was the understanding of the parties. In both of these classes a court of equity will grant relief if it clearly appears that

there is considerable excess or deficiency between the quantity actually conveyed and that named in the deed, even though this be followed by the words 'more or less'.

"Sales in gross or by boundary are divisible into three subclasses: (1) Those strictly by the tract, with reference to negotiation or estimated quantity of acres; (2) those in which the quantity may be referred to in the contract, but this was only by way of description, and under such circumstances or in such manner as to show that the parties intended to risk all contingency as to quantity, however much the discrepancy might be; and (3) those in which it is reasonably probable, from the price stated, in connection with the value and the extent of the discrepancy, or from extraneous circumstances, such as locality, value, price, time, and the conduct and conversation of the parties, that they did not intend to risk more than the usual rate of excess or deficiency in such cases, or than such as might reasonably be calculated on within the range of ordinary contingency. It is manifest that contracts within the first two subdivisions, in the absence of any proof of fraud, will not be interfered with by a court of equity, for the evident reason that the parties have intended to hazard the quantity regardless of the extent of any possible discrepancy. But under the third subdivision any unreasonable surplus or deficiency will entitle the injured party to equitable relief unless in some way he has waived or forfeited this right to demand the same."

Rathke v. *Tyler* (Iowa, 1907), 111 N. W. 436.

We will now quote from the case of *Boggs* v. *Bush,* 122 S. W. 222, in which the Court says:

"We do not regard the question as a material one in this case whether the sale was by the acre or in gross. If it was by the acre, then it does

not matter whether the deficiency is great or small; the number of acres represented must be within the boundary. If in gross, if the deficiency is so great as was probably not within the contemplation of the parties, the buyer is entitled to relief upon the same basis of computation as if the sale had been by the acre. The quantity or area of land embraced by a sale, described by metes and bounds, is, or at least may be, an essential inducement to the bargain. Farm lands are frequently, perhaps most frequently sold by the acre, or are sold at a valuation into which the number of acres enters as a material feature of the trade. While the recitation of the number of acres is a part of the description of the land, or may be, it is, not unusually, more than that. The purchaser buys not only the particular body of land, but the quantity it is represented to contain; the latter feature of the bargain affecting the amount of consideration to be paid. The unit of measure of land in this country is the acre, as of wheat it is the bushel, and of certain other articles the pound. True, the bargain in a particular instance might be without respect to such unit. In that case the principle we are discussing would not apply; but where the unit of measure is considered and treated as an element of the trade, upon which the consideration is in some part rested, it is not perceived how it can be disregarded subsequently in measuring the rights of the parties, as an immaterial matter. The addition of the qualifying clause 'more or less' relieves only the necessity for exactness. It indicates that the parties contemplated making some allowance for those inaccuracies that are usual in such measurements, and that they each took the chance of the fact being, if ascertained with accuracy, that the quantity was somewhat more or somewhat less than was represented. The difficulty arises, in administering relief upon complaint, in determining the limit. While the courts have not set a rule applicable to all cases, in Ken-

tucky no case to which our attention has been called has granted the relief where the deficit was less than 10 per cent., and none where it was refused where the deficit was as much or more than 10 per cent. In the early history of the state, when lands were cheap, and in consequence surveying was frequently attended with inaccuracies because, perhaps, it did not pay to take the time and go to the labor and expense necessary to secure greater exactness, more latitude for discrepancy was allowed. As values have enhanced, and surveying has been more carefully done, there is less reason for, and would be more injustice in, applying the rule of ancient times. The following cases are the basis for the principles advanced above: *Harrison* v. *Talbot,* 2 Dana, 266; *Smith* v. *Smith,* 4 Bibb, 81; *Shelby* v. *Shelby's Heirs,* 2 A. K. Marsh. 504; *Hall* v. *Ely* (Ky.) 76 S. W. 848; *Anderson* v. *Dawson* (Ky.) 118 S. W. 953; *Anthony* v. *Hudson* (Ky.), 114 S. W. 782; *Landrum & Adams* v. *Wells* (opinion delivered November 17, 1909), 122 S. W. 213."

Boggs v. *Bush* (Ky., 1909), 122 S. W. 222, 137 Ky. 95.

We will now quote from the case of *Estes* v. *Odom,* in which the Court says:

"If either direct fraud, or mistake so gross as to be equivalent thereto, would be suggested by such a comparison, then a recovery could be had, otherwise it could not, for 'any deficiency not so gross as to justify the suspicion of wilful deception, or mistake amounting to fraud,' is covered by the qualification 'more or less.'"

Estes v. *Odom,* 18 S. E. 355, 91 Ga. 600.

We will now quote from the case of *Cawston* v. *Sturgis,* 43 Pac. Rep. 656, 657, 658, wherein the Court says:

"Upon this state of the evidence, the defendant contends that, because plaintiff examined the land prior to his purchase, the means of ascertaining its quantity was as available to him as to the defendant, and, having failed to measure it or cause it to be measured, he cannot now be heard to say that he relied upon the defendant's representations, and was thereby deceived. But we think this contention is without merit. The land is of a peculiar and irregular shape, and, although plaintiff saw it before purchasing, it is manifest that, without an actual measurement by one skilled in such matters, he could not tell or even form a reasonable estimate as to its supposed area. The plaintiff, therefore, had a right to rely upon defendant's positive statement that he had the area of the lot calculated, and that it equaled 2½ lots, 50 by 100 feet east, and was not bound to measure or cause it to be measured for himself. To turn him out of court under such circumstances, because he did not go to the trouble and expense of having the area of the land ascertained by actual measurement, but chose to rely upon defendant's representations, would be offering a premium upon fraud and deceit. Mere knowledge of the boundaries did not charge him with knowledge of its area, so as to relieve the defendant from responsibility for his false and fraudulent representations in reference thereto. *Estes* v. *Odom,* 91 Ga. 600, 18 S. E. 355; *Speed* v. *Hollingsworth,* 54 Kan. 436, 38 Pac. 496; *Lynch* v. *Trust Co.,* 18 Fed. 486; *Antle* v. *Sexton,* 137 Ill. 410, 27 N. E. 691; Jackson v. Armstrong, 50 Mich. 65, 14 N. W. 702; *Sears* v. *Stinson,* 3 Wash. 615, 29 Pac. 205; *Ledbetter* v. *Davis,* 121 Ind. 119, 22 N. E. 744. * * * But, according to the verdict of the jury, the plaintiff paid for and supposed he was buying land equal in area to two lots and a half, when in truth and in fact he actually received land in area equal to little over two lots; and if, by the fraud of the defendant, he was deceived and paid for more

than he actually received, it seems to us the minimum recovery should be the amount paid for the deficiency, irrespective of the actual value of the true tract. This rule enables a vendee who, relying upon the false and fraudulent representations of his vendor as to the quantity of land purchased, pays for land he does not receive, to recover back, in an action for damages, the amount of money paid on account of such fraud. It works substantial justice, and is amply supported by authority. *Estes* v. *Odom,* 91 Ga. 600, 18 S. E. 355; *Smith* v. *Kirkpatrick,* 79 Ga. 410, 7 S. E. 258; *Tyler* v. *Anderson,* 106 Ind. 185, 6 N. E. 600; *Parker* v. *Walker,* 12 Rich. (S. C.) 138; *Flint* v. *Lewis,* 61 Ill. 200; *Hallam* v. *Todhunter,* 24 Iowa, 166; *Sears* v. *Stinson,* 3 Wash. 615, 29 Pac. 205."

Cawston v. *Sturgis* (Oregon, 1896), 43 Pac. Rep. 656.

We will now quote from the case of *Tyler* v. *Anderson,* 6 N. E. Rep. 602-603, wherein the Court says:

"These rules more properly apply where it appears from the deed that the land was purchased by the acre, and a certain number of acres are stated, and where the deed does not contain the words 'more or less.' But, although the deed contains these words, the vendee will be entitled to an abatement in the purchase price, as against the vendor, and others with notice, or where the notes are not commercial paper, to the amount of the deficiency, where, by the fraudulent representations of the vendor as to the number of acres, he is induced to enter into a contract that he would not otherwise have entered into, and to pay, or agree to pay, more than he otherwise would have done. And especially is this so where the land is purchased at an agreed price by the acre.

"While some of the cases seem to distinguish between sales in gross and by the acre, others hold

that there is no difference where there is fraud. It was held in the case of *Thomas* v. *Beebe,* 25 N. Y. 244, that where fraudulent representations relate to the quantity of land sold, it is immaterial whether the sale is in gross or by the acre. It was said:

" 'The liability of the defendant for a fraudulent representation is as clear if the sale of the farm was in gross as if it was by the acre. The representations of the defendant may have induced the plaintiff to enter into the contract for the purchase in gross, instead of by the acre, and there would be great injustice in depriving him, on that account, of his remedy for the fraud.'

"That there may be an abatement in the purchase price, where a fraud has been practiced upon the vendee, has been many times held by the court. In the case of *Howk* v. *Pollard,* 6 Blackf. 108, it was said:

" 'If the tracts do not contain the number of acres which the vendor represented them to contain, the defendant is entitled to an abatement out of the purchase money for so much as the quantity falls short of the representation.' * * *

"In the case before us it is alleged in the answer, in substance, as we have seen, that the amount to be paid for the lands was arrived at by a calculation upon an agreed price per acre; that the vendor represented to appellant that one tract contained 240 acres, and the other 80 acres; that she knew her representations to be false; and that appellant, in ignorance of the truth, believed, relied upon, and acted upon the representations thus made to him. Under the foregoing authorities, and others that might be cited, the facts so set up in the answer, if true, are such as to entitle appellant to an abatement from the purchase money in proportion to the deficiency in the number of acres of land. That the facts set up in the answer are true, is admitted by the demurrer. It results from the foregoing that the judgment must be

reversed. It is therefore reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to overrule the demurrer to the second paragraph of appellant's answer."

Tyler v. *Anderson* (Indiana, 1886), 6 N. E. 600.

We will now quote from the case of *Ludwick* v. *Petrie et al.,* 70 N. E. 281, wherein the Court says:

"It is the settled law in this state that if, by the fraudulent representations of the vendor as to the extent of, or the number of acres in, the tract of land about to be conveyed to him, the vendee is induced to enter into a contract that he would not otherwise have entered into, and to pay therefor more than he otherwise would have done, the vendee will be entitled to an abatement in the purchase price. *King* v. *Brown,* 54 Ind. 368; *Tyler* v. *Anderson,* 106 Ind. 185, 6 N. E. 600. Nor is the vendee compelled to rescind the contract in order to recover the damage suffered through the fraudulent representations. *English* v. *Arbuckle,* 125 Ind. 77, 25 N. E. 142; *Nyswander* v. *Lowman,* 124 Ind. 584, 24 N. E. 355."

Ludwick v. *Petrie et al.* (Ind., 1904), 70 N. E. 280.

We will now quote from the case of *O'Connell* v. *Duke,* 94 Am. Dec. 284, 285, 286, wherein the Court says:

"It has long since been settled that the relative extent of the surplus or deficit cannot furnish, *per se,* an infallible criterion in each case for its determination, but that each case must be considered with reference not only to that, but its other peculiar circumsances. The conduct of the parties, the value, extent, and locality of the land, the date of the contract, the price, and other nameless cir-

cumstances, are always important, and generally decisive. In other words, each case must depend upon its own peculiar circumstances and surroundings.

"It is evident that in a sale per acre much less variation from the quantity intended to be conveyed would be indicative of a mistake than where a specific tract is sold by metes and bounds, the quantity of acres being mentioned merely as matter of description. But the impracticability of ascertaining the exact amount in a tract with precision, the different results that are produced by different surveyors on account of roughness of ground, variation of instruments, etc., will render a small surplus or deficit, however exactly the parties may have intended to be confined to a specific quantity, ineffectual as a basis for relief; because parties are presumed to have contracted with reference to such ordinary contingencies, and to have accepted the hazard of gain or loss. On the other hand, where a surplus is evidently contemplated by the terms of the contract, but it turns out that the surplus exceeds considerably or greatly what the proof shows was contemplated by the parties, and such excess, if known, would have materially influenced the contract, which is to be judged of from the proof, this is a mistake against which relief will ordinarily be granted, unless the injured party has been guilty of culpable negligence. In these cases, the inquiry is first to be made whether the parties have made a mistaken estimate of the quantity which materially influenced the price, and then whether, notwithstanding such mistaken estimate, they have waived the right to compensation by an acceptance of the hazard of gain or loss by the estimate. Whenever the excess or deficiency is palpable and unreasonable, and such as is shown not to have been in the contemplation of the parties, relief will be granted, unless the proof shows that the hazard of gain or loss, whatever it might be, was accepted

and entered into the contract: *Young* v. *Craig,* 2 Bibb, 270; *Grundy* v. *Grundy,* 12 B. Mon. 271.

"Contracts for the sale of land have been considered with reference to the question under discussion to be of two descriptions: 1. Where the sale is of a specific quantity, which is usually denominated a sale by the acre; 2. Where the sale is of a specific tract, by name or description, each party risking the quantity. This is called a sale in gross. In the well considered case of *Harrison* v. *Talbot,* 2 Dana, 258, the supreme court of Kentucky, after an able review of the authorities, and an elaborate discussion of the principles involved, reached the conclusion that 'sales in gross may be divided into various subordinate classifications: 1. Sales strictly and essentially by the tract, without reference in the negotiation or in the consideration to any designated or estimated quantity of acres; 2. Sales of the like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances or in such a manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how much soever it might exceed or fall short of that which was mentioned in the contract; 3. Sales in which it is evident, from extraneous circumstances of locality, value, price, time, and the conduct and conversations of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might reasonably be calculated on as within the range of ordinary contingency; 4. Sales which though technically deemed and denominated sales in gross, are in fact sales by the acre, and so understood by the parties. Contracts belonging to either of the two first-mentioned classes, whether executed or executory, should not be modified by the chancellor when there has been no fraud.

But in sales of either of the latter kinds, an unreasonable surplus or deficit may entitle the injured party to equitable relief, unless he has, by his conduct, waived or forfeited his equity.'

"The court of appeals of Virginia have in numerous cases held substantially the same doctrine: *Blessing* v. *Beatty,* 1 Rob. (Va.) 302, 303; *Quesnel* v. *Woodlief,* 6 Call, 218; *Jollife* v. *Hite,* 1. *Id.* 301; *Duvals* v. *Ross,* 2 Munf. 290. This doctrine is so well supported on principle, so thoroughly imbued with a spirit of broad and comprehensive equity, and so strongly characterized by practical wisdom, in its adaptation to the exigencies of our society, where transactions to which it is applicable are of daily occurrence, that it commends itself to our unqualified approbation."

O'Connell v. *Duke,* 29 Tex. 299, 94 Am. Dec. 282.

We will now quote from the case of *McGhee* v. *Bell,* 70 S. W. 497, wherein the Court says:

"Finally, it is urged that the court adopted a wrong standard of damages; that in compensating plaintiffs for their loss of the 19 acres of land for which they gave their notes and deed of trust, and which, owing to the fraudulent representations of defendant, they did not get by his deed to them, the court erroneously fixed the compensation at the amount per acre for which the whole tract sold; that he should have awarded them the difference between the value of the land as it was represented and its value as it actually was at the time of the sale. There was no evidence tending to show that one part of the land was more valuable than another. It was represented as 80 acres, and the circuit court took the view most favorable to defendant under these circumstances, and estimated the land as represented to be 80 acres, and the whole price at $600, and reached the conclu-

sion that the defendant had agreed to purchase at a price of $7.50 per acre, and, as the deficit was 19 acres, he allowed plaintiffs in the proportion of 19 to 80, or $142.50. In so ruling the court was not without precedent. In *Gass* v. *Sanger* (Tex. Civ. App.), 30 S. W. 502, it was ruled in an action to recover for land lost because of conflict of boundaries, in the absence of any proof to the contrary, the measure of recovery was held to be such a portion of the entire price as the amount lost is to the entire tract. And to the same effect is *Skinner* v. *Walker,* 98 Ky. 729, 34 S. W. 233. In *Logan's Adm'r.* v. *Bryant* (Ky.), 44 S. W. 435, the vendor represented the boundary as containing 40 acres, when in fact it only contained 17 acres, and it was ruled by the court of appeals that the purchaser was entitled to a credit on the price for the deficiency, estimated at the contract price. Now, under the evidence in this case, it is plain that plaintiffs stipulated for 80 acres, and the defendant positively represented the quantity as 80 acres, and it is clear that, in the absence of any proof to the contrary, it was favorable to the defendant to estimate the deficit at $7.50 an acre, that being the value according to the contract price; because, though the land was neither bought nor sold professedly by the acre, the presumption is that in fixing the price regard was had on both sides to the quantity which both supposed the estate consists of. *Hill* v. *Buckley,* 17 Ves. 401. There is no evidence as to what the land would have been worth had it contained 80 acres, as it was represented, and we see no ground for reversal because the court adopted this measure of compensation."

McGhee v. *Bell* (Mo. 1902), 70 S. W. 493.

In the case of *Paisley* v. *Hatter* (Ky. 1911), 137 S. W. 250, notwithstanding that the deed recited "containing 100 acres more or less *sold in gross not by the*

acre", there being a deficiency of 12½ acres out of the 100 represented to be sold, the court allowed compensation for the 12½ acres and cited with approval, the rule laid down in *Boggs* v. *Bush,* 122 S. W. 222, cited *supra.*

We will now quote from the case of *Howes* v. *Axtell,* 37 N. W. 975-976, wherein the Court says:

> "When parties, by solemn agreement, fix a value to property, they are bound by it. The law will not, in a case of this kind, permit either party to dispute the value as settled by them. The instruction directs that the value of the land as it is found, considering its real quantity, is to be deducted from the value as settled by the agreement of the parties, and the difference will be plaintiff's damages. This rule is just, as it gives plaintiff compensation, and nothing more."
>
> *Howes* v. *Axtell* (Iowa 1888), 37 N. W. 974.

We will now quote from the case of *Paine* v. *Upton,* 41 Am. Rep. 373, 374, 375, 376, wherein the Court says:

> "In the absence of any finding of special facts and circumstances, the natural presumption is that in a sale of agricultural land the element of quantity enters into the transaction, and affects the consideration agreed to be paid. But in this case it is plain, that the representation of quantity was deemed material by the parties. The sale was perhaps not *technically a sale by the acre.* But the starting point of the negotiation was an inquiry by the purchaser, as to the quantity of land in the farm, and the gross sum originally asked was fixed by the sellers, by reckoning the land at $150 an acre, not counting any surplus there might be over two hundred and twenty acres. The price finally agreed upon was also fixed upon the sup-

position that the farm contained at least two hundred and twenty acres. This is a necessary inference from the finding, that the parties acted upon the assumption that the farm contained that number of acres, and that the contract was made and executed upon this basis. It is also very material, that the misconception under which the plaintiff labored in respect to the number of acres, was induced by *the untrue,* although not *fraudulent, representation of the defendants.* * * * We are relieved from the necessity of examining the authorities elsewhere, with a view of determining whether under such circumstances the presence of these words, in an executory contract for the sale of land, is a bar to equitable relief, by the decision of this court in *Belknap* v. *Sealey,* 14 N. Y. 143. It was there held that the introduction of the words more or less, following the enumeration of the number of acres, was no obstacle to relief in equity upon the ground of mistake. The authorities in this State were carefully reviewed in the able opinion of Comstock, J., and it was satisfactorily shown that the cases supposed to have a bearing adverse to this view were of two classes, first, cases where the question was one of construction purely, in a court of law, and not one of mistake in a court of equity, and second, cases where relief was denied on the ground that it appeared from the words more or less, and the extrinsic circumstances, that the risk of the quantity was one of the elements of the contract. The court said, that those words, in a contract or conveyance of land, do not import a special engagement that the purchaser takes the risk of the quantity, and that while their presence may render it more difficult to prove such a mistake as will justify the interference of equity, they are not equivalent to a stipulation that the mistake, when ascertained, shall not be ground of relief. The conclusion in *Belknap* v. *Sealey,* is founded, we think, upon the most obvious equity. It is not a satisfactory an-

swer to the claim for relief, against a mistake in the quantity of land contracted to be sold, embraced within given boundaries, to say that the statement of the number of acres is mere matter of description. It is true that such a statement, following a description by boundaries, does not amount to a covenant that the land contains that quantity, but it is quite another question whether equity will not relieve a purchaser when both parties supposed the statement to be true, and the bargain was made upon that belief—and it turns out that the quantity is less—and the mistake materially affected the consideration. It was said in *Belknap* v. *Sealey,* that the primary purpose of these words is to indicate that all the land within the boundaries specified is included in the contract or deed, and is intended to pass to the purchaser. They are also intended to cover small discrepancies between the actual quantity and that stated in the contract or deed and no inference of mistake would arise from a small discrepancy merely. But where the difference is material and the mistake is confessed, or satisfactorily proved, there would seem to be no violation of principle in granting relief."

Paine v. *Upton,* 87 N. Y. 327, 41 Am. Rep. 371.

We will now quote from the case of *Belknap* v. *Sealey,* 67 Am. Dec. 129, 130, wherein the Court says:

"A deed which describes the land and states the number of acres, although with the words 'more or less', clearly imports that there is not a great deficiency or excess. If the deficiency is one-half, the instrument carries on its face a gross misrepresentation. And it is quite material to observe that such words do not import a special engagement that the purchaser takes the risk of the quantity. Their presence in a contract or deed may render it more difficult to prove such a mistake as will justify the interference of equity, but they are

not equivalent to a stipulation that the mistake, when ascertained, shall not be a ground of relief. Even if that construction were to be placed upon them, it would still hold true that the contract, viewed in that light, may be entered into under misrepresentation and error so gross that it should not be allowed to stand."

Belknap v. *Sealey,* 14 N. Y. (4 Ker.), 143, 67 Am. Dec. 120.

We will now quote from the case of *Brown* v. *Yoakum,* 170 S. W. 805, wherein the Court says:

"However innocent appellant may have been in his representations as to the number of acres, that would not relieve him of liability, if the vendees relied upon such representations and were induced thereby to take the land. Of course, if there had been evidence showing that appellees took the risk as to the quantity of land, they could not recover; but the mere fact that they accepted a deed without a general warranty did not prove that such risk had been taken. The evidence, on the other hand, tended to show that the vendees expected to get the full acreage paid for by them and relied on the representations of the vendor as to the acreage."

Brown v. *Yoakum* (Tex. 1914), 170 S. W. 803.

We will now quote from the case of *Sine* v. *Fox,* 11 S. E. 219, 220, in which the Court says:

"Taking the facts proved by all the evidence in this cause, it is very clear that the plaintiff is entitled to the relief prayed in his original bill. While, according to the decisions of this court, the sale here cannot be regarded as a sale by the acre, it is plainly a sale in gross of a specified quantity of land. Where a vendor by deed, for an entire sum, conveys a tract of land by metes

and bounds, stating therein the quantity, this on its face is a sale in gross, and not by the acre; but, as the specification of the quantity, without any qualifying words, renders the deed ambiguous as to whether it was or was not intended that the vendor would warrant that there was that quantity, the court will admit parol evidence of the circumstances surrounding the parties, and their situation at the time of the sale, and also their subsequent conduct in carrying it into execution. *Hansford* v. *Coal Co.,* 22 W. Va. 70; *Crislip* v. *Cain,* 19 W. Va. 438; *Anderson* v. *Synder,* 21 W. Va. 632. In *Kelly* v. *Riley,* 22 W. Va. 247, this court held as follows: 'Where a person has made a sale of land in gross, at a specified price, upon an unqualified statement that it contains a definite quantity, or specified number of acres, it will be held, *prima facie,* that the vendee was influenced to pay, or agree to pay, the price specified because of such statement; and, if it is afterwards established that there is a deficiency in the quantity in excess of what may be rightfully attributed to the usual inaccuracies in surveying, the vendor, in the absence of all other proof, will be presumed to have committed a fraud on the rights of the vendee by such statement of the quantity, and a court of equity will for this reason grant relief to the vendee for such deficiency.' See, to the same effect, *Depue* v. *Sergent,* 21 W. Va. 326."

Sine v. *Fox.* 33 W. Va. 521, 11 S. E. 218.

We will now quote from the case of *Couse* v. *Boyles,* 38 Am. Dec. 517, wherein the Court says:

"The plain and sensible rule, as it appears to me, is this: when land is sold as containing so many acres, 'more or less,' if the quantity on an actual survey and estimation, either overrunning or falling short of the contents named, be small, no compensation should be recovered by either party. The word 'more or less,' must be intended

to meet such a result. But if the variance be considerable, the party sustaining the loss should be allowed for it. And this rule should prevail where it arises from mistake only, without fraud, or deception. The case of *Hill* v. *Buckley,* 17 Ves. 401, decided by Sir William Grant, master of the rolls, is very much in point, and settles the question in a satisfactory manner. That was a bill for a specific performance; the quantity of land was represented to be two hundred and seventeen acres and ten perches. It turned out to be about twenty-six acres less, and the party had an abatement *pro tanto.* In this case, too, there was no evidence of any intended deception; and the rule is stated to apply generally, although the land is not bought or sold professedly by the acre; the presumption being, that in fixing the price, regard was had to the quantity. * * * The defendant, by his answer, distinctly declares he never would have paid the price he did, had he known the true quantity of land. The variance is too large to be passed by; taking a medium quantity between the two estimates, and it will leave a deficiency of nearly thirty acres on the purchase of one hundred and thirty-five acres. The fact that Mr. Boyles *lived a neighbor and saw* the land daily, *can have no bearing on the question,* nor can the doctrine of *caveat emptor* have any application. A purchaser relies, and has a right to rely upon the vendor for the number of acres, and may and usually does place implicit confidence in his statements."

Couse v. *Boyles* (New Jersey), 3 Green's Chanc. 212, 38 Am. Dec. 514.

We will now quote from the case of *Triplett* v. *Allen,* 21 Am. Rep. 321, in which the Court says:

"The court is of the opinion that under the contract of the parties and the evidence taken in

the cause, the sale was a sale per acre and not a sale in gross, and that the appellee is bound to make good the deficiency at the average value of the home tract per acre.

"But if the contract can be considered a sale in gross and not per acre, the insertion of the words 'more or less' in the deed does not affect the case. For it is well settled by repeated decisions of this court, that the employment of such words will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency, beyond what may be reasonably attributed to small errors from variation of instruments or otherwise; unless indeed, there be evidence to show that a contract of hazard was intended. In the absence of such evidence, it is to be presumed that the parties contract with reference to quantity. It is an important element in every agreement, and *prima facie* must be intended to influence the price.

"Ten acres in a tract of one hundred and sixty-six acres, especially when worth at least $50 per acre, is not one of these 'small deficiencies' to be covered by the phrase 'more or less'; and the vendor must be held liable, and the vendee compensated for such deficiency."

Triplett v. *Allen,* 21 Am. Rep. 320, 26 Gratt. 321.

We will now quote from the case of *Smith* v. *Ely,* 76 Am. Dec. 109, 110, wherein the Court says:

"It appears to be well settled that in the sale of land where there has been misrepresentation as to the quantity, though innocently made, and the parties were under a mistake as to the quantity, and the deficiency is so great as to have been material in the object of the purchase, affecting the essence of the contract, equity will grant relief: 1 Sugden on Vendors, c. 7, sec. 3; *Mitchell* v. *Zimmerman,* 4 Tex. 75 (51 Am. Dec. 717);

4 Kent's Com. 457; 1 Story's Eq. Jur., sec. 141. And this, says Judge Story, would be so, although the land was described as so many acres, 'more or less.' It would certainly be so where the land is sold by the acre, and the statement of the quantity of acres in the deed is not mere matter of description, but is of the essence of the contract.

"The plaintiff alleges that he bought and paid for the land by the acre; that there was misrepresentation and a mistake as to the quantity of land conveyed; and that it fell short one hundred and fifteen acres of the quantity the tract was supposed to contain and the deed purported to convey. A deficiency so great in a sale by the acre of a tract of five hundred acres can scarcely be supposed to have been within the risk which the parties meant to incur, or to have been intended to be embraced by the words 'more or less," employed in the deed. There can be little doubt that the allegations of the petition show a cause of action; and the question is, whether it was barred by the statute of limitations at the time of bringing the suit."

Smith v. *Ely,* 24 Tex. 345, 76 Am. Dec. 109.

We will now quote from the case of *Hays* v. *Hays,* 11 L. R. A. 377-378, in which the Court says:

"The difficulty arises in determining whether the sale was intended to be in gross or by the acre. If in gross, the mention of the quantity of acres, after another and certain description, whether by metes and bounds, or other known specifications, is not a covenant or agreement as to the quantity to be conveyed. In such cases the statement of acreage is regarded as mere matter of description and not of contract. But the terms 'by estimation,' 'more or less,' or other expressions of similar import, added to a statement of quantity, can only be considered as covering inconsiderable or small differences, one way or the

other, and do not, in themselves, determine the character of the sale. Even where the sale has been in gross, and not by the acre, if it appear that the estimated number of acres was in fact the controlling inducement, and that the price, though a gross sum, was based upon the supposed area and measured by it, equity will interfere to grant relief and rescind the contract on the ground of gross mistake. 2 Warvelle, Vend., pp. 838, 839.

"Upon a satisfactory showing, equity will interfere to vacate a contract and decree a reconveyance, or to correct the conveyance or award compensation.

"A purchaser of land has a right to rely upon the representations of the vendor relative to the extent and boundaries of his land, and is not under any obligation to examine the plats and consult the records. The law presumes that the owner knows his own property and that he truly represents it; and if the purchaser, trusting to the owner's representations, is misled thereby, to his injury, an action will lie if the representation be false. If the vendor fraudulently represents the number of acres to be greater than they are, and thereby induces the vendee to give more for the tract than he otherwise would, the vendee is entitled to an abatement or to a compensation for the deficiency by way of damages. 2 Warvelle, Vend., p. 974.

"Mr. Sugden, in his valuable work on Vendors, vol. I, p. 489, in speaking of the question now under consideration, says: '1. If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey.

"'2. The rule is the same though the land is neither bought nor sold professedly by the acre. The general rule, therefore, is that where a misrepresentation is made as to the quantity though

innocently, the right of the purchaser is to have what the vendor can give, with an abatement for so much as the quantity falls short.' See also *Tarbell* v. *Bowman,* 103 Mass. 341; *Solinger* v. *Jewett,* 25 Ind. 479; *Tyler* v. *Anderson,* 106 Ind. 185, 3 West. Rep. 661.

"In the case of *Solinger* v. *Jewett, supra,* the land was purchased at the agreed price of $22 per acre. The tract described as containing 121 acres more or less contained 84.31 acres only. It was held by this court that the difference between the estimated and actual quantity of the land amounted to a gross mistake, and that the purchaser was, upon that ground, entitled to recover from the vendor by way of damages for the difference between the estimated quantity and the actual quantity in the tract sold and conveyed.

"In the case before us the land was sold at $100 per acre, and was estimated to contain 28.40 acres, when in fact it contained 23.40 acres only. It will thus be seen that the actual quantity of land in the tract sold and conveyed was nearly one-fifth short of its estimated quantity, making a difference in value of $500. This, in our opinion, was such a mistake as entitled the appellee to relief."

Hays v. *Hays* (Ind. 1890), 11 L. R. A. 376.

We will now quote from the case of *Hall* v. *Ely,* 76 S. W. 850, wherein the Court says:

"It is further apparent that, though the consideration for the land is stated in gross in the deed as $3,500, the sale was understood by the parties as one by the acre; but, whether this was true or not, in order to effect a sale of the land to the appellant, it is evident that it was necessary for appellant and his agent to convince him that the land contained as much as 185 acres, in which they seem to have succeeded. * * * We

think it evident that it was never intended or contemplated by the parties that such a loss in quantity would occur as is shown to have resulted in this case, and, moreover, this sale in gross was in reality understood by the parties thereto to be a sale by the acre, as shown by their conduct, and the circumstances surrounding the entire transaction. We are of the opinion, therefore, that this is one of the cases in which equitable relief should be allowed because the deficit is unreasonable and excessive. * * * The contract price should have been abated at the ratable price per acre for the difference between 158 acres and 74 poles, the net amount of land appellant received the title to, and was put in possession of, and the 185 acres which appellee represented to appellant he was selling him."

Hall v. *Ely* (Ky. 1903), 76 S. W. 848.

We will now quote from the case of *Lenoch* v. *Yoss,* 157 Iowa, 314, wherein the Court says:

"Where the parties agree upon the price per acre, if there is found to be a material shortage, the damages sustained will ordinarily be the price per acre agreed upon multiplied by the number of acres short. This measure of damages is right, because of the solemn agreement of the parties that the land is worth the amount per acre named."

Lenoch v. *Yoss,* 157 Iowa, 314.

We will now quote from the case of *Epes* v. *Saunders et al.,* 109 Va. 99, in which the Court says:

"Where persons enter into an agreement for the payment of a gross sum for a tract of land, upon an estimation of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre and not in gross, unless the contract plainly

indicates that it is a sale in gross, and this presumption can only be overcome by clear and cogent proof."

Epes v. *Saunders et al.,* 109 Va., 99.

We will now quote from the case of *Harrison* v. *Talbot,* 2 Dana, 266 (Ky.), wherein the Court says:

"Sales in gross may be subdivided into various subordinate classifications: First—Sales strictly and essentially by the tract, without reference in the negotiation or in the consideration to any estimated or designated quantity of acres. Second—Sales of the like kind, in which though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description and under such circumstances or in such manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how-much-soever it might exceed or fall short of that which was mentioned in the contract. Third—Sales in which it is evident from extraneous circumstances of locality, value, price, time and the conduct and conversations of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency. Fourth—Sales which, though technically deemed and denominated sales in gross, are, in fact, sales by the acre, and so understood by the parties.

"Contracts belonging to either of the two first mentioned classes, whether executed or executory, should not be modified by the chancellor when there has been no fraud. Such was the contract in the case of *Brown* v. *Parish,* lately decided by this court.—Ante. 6.

"But in sales of either of the latter kinds, an unreasonable surplus, or deficit, may entitle the

injured party to equitable relief, unless he has by his conduct waived or forfeited his equity.

"Now the just application of the foregoing principles is not deemed difficult in this case. This belongs, we have no doubt to the third classification. And even if, at the time of the contract a deed, instead of a covenant, had been executed we should be strongly inclined to the opinion that Harrison would have been equitably entitled to some reclamation for an unexpected and unreasonable surplus. The date of the contract, the value of the land and its locality, would altogether tend strongly to the inference that as there is no proof that the parties contemplated more than an ordinary variation from the estimated quantity, the utmost range of the contingency which they intended that the term of their written agreement should embrace, would not include so large a surplus or deficiency as ninety acres."

Harrison v. *Talbot,* 2 Dana, 266 (Ky.)

We will now quote from the case of *Wardell* v. *Birdsong,* 115 Va. 294, wherein the Court says:

"It would seem to us shocking to the conscience of a court of equity to hold that a purchaser of a parcel of land sold and conveyed to him as 200 acres, more or less, when in fact the acreage is but 94½, should be required to keep and pay the purchase money for the land, although the sellers of the land, as well as the buyer, believed there were in the tract conveyed about 200 acres, and although the conveyance also contains the clause 'and it is understood this land is sold by the lump and not by the acre.' * * *

"Contracts of hazard, such as we are here considering, have not been discountenanced by the courts when they have been clearly established and are fair and reasonable, but courts of equity do not regard them with favor, the presumption being against them, which presumption is to be

overcome, if at all and effectually, by clear and cogent proof; and where the parties contract for the payment of a gross sum for a tract or parcel of land, upon an estimate of a given quantity, the presumption is that the quantity influences the price to be paid and that the agreement is not one of hazard. *Blessing's Admr.* v. *Beaty,* 1 Rob. (40 Va.) 305, in which case the court held that the appellant was entitled to compensation for the deficiency of 34½ acres in a tract of 503 acres, on the ground of mutual mistake."

Wardell v. *Birdsong,* 115 Va. 294.

We will now quote from the case of *Boschen* v. *Jurgens,* 92 Va. Rep. 759, in which the Court says:

"These authorities not only show that equity will take jurisdiction of this class of cases, upon the ground of mistake, but that 'every sale of real estate, where the quantity is referred to in the contract, and where the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale per acre; that, while contracts of hazard are not invalid, courts of equity do not regard them with favor. The presumption is against them, and, while such presumption may be repelled, it can only be effectually done by clear and cogent proof; that the burden of proof is always upon the party asserting a contract of hazard, for the presumption always being in favor of a sale per acre, a sale in gross, or contract of hazard, must be clearly established by the facts; that where the parties contract for the payment of a gross sum for a tract or parcel of land, upon the estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard; that whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the

terms of the contract and all the facts and circumstances connected with it. But in interpreting such contracts the courts, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre wherever it does not clearly appear that the land was sold by the tract and not by the acre."

Boschen v. *Jurgens,* 92 Va. 756.

We will now quote from the case of *Hill* v. *Buckley,* 17 Ves. 394, wherein the Court says:

"Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give; with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price, regard was had on both sides, to the quantity which both suppose the estate to consist of."

Hill v. *Buckley,* 17 Ves. 394.

The proposition of law in respect to sales in gross and sales by the acre, and as to the meaning of the words "more or less", are also discussed in the following cases, and plaintiff's position is sustained by these authorities, which we herein numerate, but do not quote from, viz.:

Hallam v. *Todhunter,* 24 Iowa 167;
Parker v. *Walker,* 12 Mich. Law, 138 (S. C.);
Walling v. *Kinnard,* 60 Am. Dec. 216;
Strauss v. *Norris,* 79 Atl. 611;
Libby v. *Dickey,* 27 Atl. 253;
Winton v. *McGraw,* 54 S. E. 506;

Perkins Manufacturing Co. v. *Williams,* 25 S. E. 556;
Bogg's Exs. v. *Harper's Admrs.,* 31 S. E. 943;
Phifer v. *Steenburg,* 64 So. 265;
Moffet v. *Schaar,* 131 Pac. 589;
Moore v. *Hazelwood,* 4 S. W. 215;
Yaryombeck v. *Grier,* 32 S. W. 236;
Hall v. *McCammon,* 37 S. W. 1026;
Accord v. *Mitchell,* 149 N. W. 839;
Mills v. *Kampfe,* 202 N. Y. 46;
West v. *Carter,* 103 Pac. 21;
Solinger v. *Jewett,* 25 Ind. 479;
M'Coun v. *Delaney,* 3 Bibb. 46 (Ky.);
Young v. *Craig,* 2 Bibb. 270 (Ky.);
Crane v. *Prather,* 4 J. J. Marsh 75 (Ky.);
Hutchings v. *Moore,* 4 Mett. 101 (Ky.);
Pringle v. *Samuel,* 1 Litt. 43 (Ky.);
Skinner v. *Walker,* 98 Ky. 729;
Elder v. *Lewis,* 2 Ky. Law Rep. 229;
Shubert v. *Chambers,* 4 Ky. Law Rep. 266;
Harelmeir v. *Sanders,* 5 Ky. Law Rep. 865;
Haslip v. *Austill,* 4 Ky. Law Rep. 982;
Phelps v. *Wilson,* 16 La. 185;
Campbell's Ex. v. *Wilmore,* 6 J. J. Marsh 209 (Ky.);
Mendenhall v. *Steckel,* 47 Md. 453;
Marbury v. *Stonestreet,* 1 Md. 152;
Thwing v. *Davison,* 33 Minn. 186;
Leigh v. *Cramp,* 36 N. C. 299;
Wilcoxson v. *Calloway,* 67 N. C. 163;
Joplim v. *Nunnelly,* 134 Pac. 1177;
English v. *Arbuckle,* 25 N. E. 142;
Berry's Exx. v. *Fishburne,* 51 S. E. 827;
Collins v. *Stodghill,* 79 S. W. 185;
Paisley v. *Hatter,* 137 S. W. 250;
Moreland v. *Henry,* 161 S. W. 1105;
Earl v. *Bryan,* 62 N. C. 278;
Douglass v. *Plotkin,* 13 Ohio Cir. Ct. Rep. 461;
Procter v. *Bell,* 9 Ohio Dec. 853;
Groves v. *Brinkerhoff,* 4 Hun. 305 (N. Y.);
McIntyre v. *Harrington,* 43 Mscl. 94 (N. Y.);

Wilson v. *Randall,* 67 N. Y. 338;
Franco-Texan Land Co. v. *Simpson,* 1 Tex. Civ. App. 600;
Walsh v. *Hale,* 25 Grat. 313 (Va.);
Camp v. *Norfleets Adms.,* 83 Va. 380;
Grayson v. *Buchanan,* 88 Va. 251;
Holback v. *Kilgores,* 26 Gratt. 442 (Va.);
Blessings Admrs. v. *Beatty,* 1 Rob. 287 (Va.);
Norfolk Trust Co. v. *Foster,* 78 Va. 413;
Watson v. *Hoy,* 28 Gratt. 698 (Va.);
Darling v. *Osborne,* 51 Vt. 148.

ARGUMENT ON POINT THAT DEFENDANTS ARE LIABLE FOR ALL INSTRUMENTALITIES USED BY AGENTS IN EFFECTING SALE.

The plaintiff, in this action, contends that all of the representations which were made to her in respect to the property sold to her by the three Scheiber brothers, were such representations as she had a right to rely upon. In respect to the real property they pointed out certain land-marks, fences and trees, etc., and in that manner roughly indicated indefinite boundary lines, and then and there stated to plaintiff that the entire land which was included within the rough boundary lines thus indefinitely pointed out, was all clear level land, and told her that the expanse which she looked upon from where she stood, was the land which they wanted to sell her. Plaintiff, even though she had been dealing at arm's length, and upon an equal footing with the defendants, had a right to rely upon that representation. The defendants' agents represented to her that the land in question was all clear and level and the best quality of alfalfa land. Plaintiff had a right to rely upon that statement, even though she were

dealing at arm's length with the defendants. Defendants' agents represented to plaintiff that said land, being all first-class alfalfa land, would produce five and six cuttings a year of alfalfa and that the land would produce eight to ten tons of alfalfa per acre each season. That, that was what was being produced by the portion then planted to alfalfa and that the balance would do likewise. That also is a statement and representation which plaintiff had a right to rely upon and would have had a right to rely upon even though she had been dealing at arm's length with the defendants. In no way does the doctrine of *caveat emptor* apply in this case, and the plaintiff was not bound to investigate the property in any special manner. All of the representations made to her by defendants or their agents in respect to the quantity or quality of the producing power, or character of the land, were such as could be relied upon by a person dealing at arm's length with the defendants and upon an equal footing. But, in this case, the purchaser was not dealing at arm's length with the vendors, and she was not upon an equal footing with them. She knew nothing whatever of land of any character, or land values of any character, and was totally inexperienced in reference to the property which she was purchasing. Neither did she know anything about horses or cattle or dairying or dairy farm implements. The purchase which she made of the property of the three Scheiber brothers, was made purely by reason of the counsel and advice of Dr. F. I. Ramos, to whom she was at

that time engaged to be married. The said F. I. Ramos had her entire trust and confidence and it was in reliance upon his business judgment and integrity that she purchased this property of defendants. She bought the property simply because he told her to buy it. Defendants' agents, in order to induce the said F. I. Ramos to counsel and advise plaintiff to purchase the said property, gave to the said F. I. Ramos the sum of $1,500 to put into his own private pocket for himself; and for such consideration, the said F. I. Ramos did so advise plaintiff, and plaintiff, in turn acted upon his advice. In their answer to the complaint, defendants deny all knowledge of any such transaction had, or existing between their said agents and the said F. I. Ramos; and deny that they ever authorized the said agents to enter into any such an agreement with the said F. I. Ramos; and defendants now seek to be excused from any liability growing out of that transaction, upon the ground that they did not participate in it, and were in nowise a party to it. The authorities hereinafter cited will be devoted to the proposition that they are liable, even though it is true that they did not authorize the transaction. In commencing this argument it might be well in the first instance to quote Section 2338 of the Civil Code of the State of California, which reads as follows:

> "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction

of such business, and for his wilful omission to fulfill the obligations of the principal."

Under this section in the cyclopedic codes, many California cases appear all to the point that a principal is liable to third persons for all frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances, and misfeasances, and omissions of duty of his agent in the course of his employment. Such was the holding in the case of *Bank of California* v. *Western Union Telegraph Co.,* 52 Cal. 280. This is an extremely important case, and the discussion in the opinion throws a great deal of light on the present situation.

A principal, having accepted the benefits of a fraudulent contract made by his agent, is equally bound with his agent for any fraudulent representations which induced it. *Freeman* v. *Kieffer,* 101 Cal. 254.

F. I. Ramos occupied a fiduciary relationship with the plaintiff in this action and this fact was well known to defendants' agents. Their giving him $1,500 for himself out of their commission, while at that time knowing that he occupied this position of trust and confidence with the plaintiff, was a wrongful act absolutely vitiating the contract. They knew that she would not buy anything without his approval, and the giving to him of this money was an absolutely immoral and illegal way of securing her agreement to purchase. The defendants are liable for the acts and representations of their agents in this respect, and they are also liable for the acts and representations

of their sub-agents. The cases which we will now quote are sufficient, we believe, to back up everything that we have herein just stated.

We will now quote from the case of *Neuman* v. *Friedman,* 136 S. W. 251, wherein the Court says:

> "So jealous is the law with respect to the relation of trust which obtains between principal and agent that it condemns as fraudulent and affords the right of relief from, or the cancellation of all contracts, conveyances, etc., which have been effected between the parties through an agent in the employ of both, provided the relief or cancellation sought is by one who is ignorant of the double agency, and he is not estopped from complaining on the theory of condonation."
>
> *Neuman* v. *Friedman* (Mo. 1911), 136 S. W. 251.

We will now quote from the case of *Harper* v. *Fidler,* 105 Mo. App. 680, wherein the Court says:

> "The antagonism which exists between the opposite parties to a bargain is generally recognized by law. Each acts and has a right to act with a view to his own interests and they deal at arm's length. Accordingly if one acts by an agent, that agent should be not nominally, but really in place of the principal with his self-interest undisturbed by calculations as to the interests of the opposing party. This, as well as the exercise of the best skill and judgment of his agent as to the contingencies of the bargain, the principal has the right to demand. Accordingly, a contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law, that the contract is held void. Such bargains are constructively fraudulent."
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> *Harper* v. *Fidler,* 105 Mo. App. 680.

We will now quote from the case of *Alger* v. *Anderson,* 78 Fed. 729, wherein the Court says:

> "It is now fully established and no longer open to question, that the principal is bound by the fraud of his agents in making a sale, in relation to that sale, as much so as the principal would be, if acting in person; and this, notwithstanding the fraud was perpetrated without the knowledge or approval, and against the consent of the principal. * * * It is well settled, consequently, that the fact of the agent having been bribed or tempted to betray his principal is sufficient to entitle the principal to repudiate the transaction, and it is not necessary as a basis for relief, for such principal to show the actual effect of the bribe or gift upon the agent. The ground on which the rule rests is much deeper and broader than a mere question of evidence and takes into full account human nature. The agent is not allowed, by gift, commission, or other form of compensation or consideration, to assume an attitude in conflict with the very best interests of his principal. It is a relation which, on grounds of public policy, demands the utmost loyalty to the principal at all times."
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> *Alger* v. *Anderson,* 78 Fed. 729.

We will now quote from the case of *Yeoman* v. *Lasley,* 40 Ohio St. 190, wherein the Court says:

> "A vendee cannot be his own vendor. So vital is this principle that the same person cannot be in one transaction, the agent of both vendor and vendee, unless both know the fact, and consent thereto. If a vendor secretly bribe the agent of the vendee, and induce him to deceive his principal in a matter material to the sale, the vendee's right, on discovery of the fraud, to a recission, is undoubted."
>
> *Yeoman* v. *Lasley,* 40 Ohio St. 190.

We will now quote from the case of *Commonwealth S. S. Co.* v. *American Shipbuilding Co.*, 197 Fed. 780, wherein the Court says:

> "It seems plain that when one party is endeavoring to warp the judgment and integrity of the agent of another, and endeavoring to induce that party to cheat his principal, all of the dictates of equity and justice make it the plain duty of a court of equity to set aside the entire transaction.
>
> "Such action on the part of a court has been suggested by counsel for the defendant in their able brief, as an altruistic enthusiasm for purity and righteousness in commercial transactions, be they large or small, must conform with the fixed standards of honesty. It would indeed be a travesty upon justice, if a court of equity, having placed before it all of the elements which constitute fraud and bribery, would refuse to render relief and say to the parties that an action for damages to recover the amount of the bribe, was the proper remedy. If such were the rule of conduct of the courts, dishonest parties might bribe agents at will, and, if they were discovered in their bribery respond to damages to the extent of their bribe, and, if not discovered, enjoy the full amount and extent of their illegal action. The courts cannot recognize such a doctrine and will not stop to inquire whether the contract was fair or otherwise, but will set aside the entire transaction as fraudulent and inequitable. With commercial advancement and the evolution of modern business, fraud has become too prevalent and too readily reconciled as an incident to financial achievement. Fraud should be prevented by being made as far as possible impossible of perpetration, and the party who enters into a fraudulent transaction should do so at his peril. It is no duty of a court to weigh the equities of joint test-feasens, or of bribe givers and bribe takers. A court should have little respect for itself if it

endeavored to adjust the rights between the conspiring parties who endeavored to perpetrate a fraud."

Commonwealth S. S. Co. v. *American Shipbuilding Co.,* 197 Fed. 780.

We will now quote from the case of *Stelting* v. *Bank of Sparta,* 117 N. W. 798, wherein the Court says:

"Where a broker employed to procure a purchaser of land, intentionally or otherwise, pointed out the wrong land to an intended purchaser and the purchase was made in the belief that the land purchased was shown, the consideration paid may be recovered, though the vendor did not know when it was paid, that the wrong land had been shown. * * * One employed to procure a purchaser for real estate, has the power to do those things ordinarily done in such cases to procure a purchaser for the property."

Stelting v. *Bank of Sparta* (Wis., 1908), 117 N. W. 798.

We will now quote from the case of *Farris* v. *Gilder,* 115 S. W. 645, in which the Court says:

"The land having been listed by Gilder with Eubanks for sale, Gilder would be responsible for any false representations made bringing about the sale, and the principal would not be permitted to take the benefit of his agents' act to the injury of an innocent third party."

Farris v. *Gilder* (Tex., 1909), 115 S. W. 645.

We will now quote from the case of *Copeland* v. *Tweedle,* 122 Pac. 302, wherein the Court says:

"Fraudulent misrepresentations by an agent as to the amount of timber on land placed with him

for sale, is within scope of his agency and principal bound thereby."

Copeland v. *Tweedle* (Ore., 1912), 122 Pac. 302.

In the case of *Hussey* v. *Michael,* 138 Pac. 596, fraudulent statements were made to agents, who in turn innocently repeated these statements to subagents, who in their turn repeated these statements to plaintiff and thereby sold the land. The Court held principal to be liable.

We will now quote from the case of *Elwell* v. *Chamberlain,* 31 N. Y. 611, wherein the Court says:

"They (the principals) cannot be permitted to enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud on the terms of making complete restitution. But so long as he retains the benefits of the dealing he cannot claim immunity on the ground that the fraud was committed by the agent and not by himself."

Elwell v. *Chamberlain,* 31 N. Y. 611.

We will now quote from the case of *Wright* v. *Calhoun,* 19 Tex. 412, wherein the Court says:

"It would indeed be a monstrous doctrine to hold that a principal may speculate upon and enjoy the fruits and the frauds of his authorized agent, and incur no responsibility to the injured parties—such a doctrine can have no sanction, either in morals or in law. Nothing can be more clear, than that the principal in this case cannot

avail himself of the fraudulent contract of his agent. The purchase being fraudulent, on the part of the agent, Rogers, cannot enure to the benefit of the principal, Calhoun, whether he was, or was not *particeps fraudis.*"

Wright v. *Calhoun,* 19 Tex. 412.

We will now quote from the case of *L. Mayer & Co.* v. *McClure,* 36 Miss. 389, wherein the Court says:

"The principal is liable to third persons in a civil suit for the frauds and misfeasances, or neglect of duty of his agent, and all those whom the agent employs about his business, though without his knowledge or consent the third persons therefore who treat with a sub-agent as with one having authority, have no right, as against the principal, to set up that the agent is without authority to act for the benefit of the principal, and moreover, the principal may ratify the act of such sub-agent and thus secure the benefit of an act done by him."

L. Mayer & Co. v. *McClure,* 36 Miss. 389.

In the case of *Renwick* v. *Bancroft et al.,* 56 Iowa 527, the Court held that where an agent was authorized by the owners to sell certain land, exercising his own discretion as to price and terms after an examination of the land, it was held that he might properly employ a sub-agent to find a purchaser, and that the sale made by such sub-agent, was binding upon the owners.

We will now quote from the case of *Gum* v. *Equitable Trust Co. et al.,* 1 McCrary's Rep. 51 (U. S. Cr. Ct.), wherein the Court says:

"It is not necessary that a sub-agent should be

known to his principal, or in any way recognized by his principal in order to bind the latter. * * * Authority is sometimes implied from the very nature of the duties and powers committed to a general agent to employ sub-agents, and when this is the case, the principal is bound by the acts of the sub-agent, although the latter may never be known or recognized by the principal."

Gum v. *Equitable Trust Co. et al.,* 1 McCrary's Rep. 51 (U. S. Cr. Ct.)

In the case of *McKinnon* v. *Vollmar,* 6 L. R. A. 121, the Court held that showing land to a prospective customer is a mere ministerial act which an agent, for the sale thereof, may appoint another to do.

We will now quote from the case of *Nelson* v. *Title Trust Co.,* 100 Pac. 730, wherein the Court says:

"The owner is the beneficiary of the sale. The salesmen are his agents, and under the ordinary rule of agency the owner is responsible for the representations his agent made in the line of his employment. It is true that the agency in this case is one degree removed; Erickson, who sold the lots to appellant, having been employed by Arnold & Nachant, the firm who had the contract with the owner to sell the addition, Arnold & Nachant agreeing to divide with Erickson their commission on lots sold by him. But this was a mere detail as to the manner of sale by Arnold & Nachant. The owner was still equally the beneficiary of the transaction, and it would tend to encourage fraudulent representations if such owner were allowed to escape responsibility through the subterfuge of having the sale made by a sub-agent. He must not be allowed to disclaim responsibility and, at the same time, receive the benefit of the fraudulent transaction."

Nelson v. *Title Trust Co.* (Wash., 1909), 100 Pac. 730.

We will now quote from the case of *Phoenix Insurance Co.* v. *Willis,* 8 Am. St. Rep. 569, wherein the Court says:

> "It is well settled that the knowledge of the agent will be imputed to the principal in matters where the agent is acting in the scope of his authority, and that the principal cannot avail himself of the fruits of his agent's fraud on account of his ignorance of such fraudulent conduct."

Phoenix Ins. Co. v. *Willis* (70 Tex. 12), 8 Am. St. Rep. 569.

We will now quote from the case of *Locke* v. *Stearns,* 42 Mass. 560, in which the Court says:

> "The rule is laid down generally in a recent compilation of good authority, that though a principal in general, is not liable criminally for the act of his agent, yet, he is civilly liable for the neglect, fraud, deceit or other wrongful act of his agent in the course of his employment, though in fact the principal did not authorize the practice of such acts, but the wrongful or unlawful acts must be committed in the course of his agent's employment."

Locke v. *Stearns,* 42 Mass. 560.

We will now quote from the case of *Jewett* v. *Carter,* 132 Mass. 335, wherein the Court says:

> "If the agent, acting within the scope of his authority, represented that he knew facts which were not true but which he did not know to be false, it is immaterial whether or not the plaintiffs knew that he was to make the representations, or expressly authorized them. Such representations

are fraudulent in the agent, and the principal is bound by them."

Jewett v. *Carter,* 132 Mass. 335.

We will now quote from the case of *Tagg* v. *Tennessee National Bank,* 56 Tenn. 479, wherein the Court says:

"A fraudulent representation or concealment of material facts by the agent when engaged in the principal's business, will charge the principal constructively through the agent."

Tagg v. *Tennessee National Bank,* 56 Tenn. 479.

We will now quote from the case of *Eilenberger* v. *Protective Mutual Fire Insurance Co.,* 89 Pa. St. 464, wherein the Court says:

"The fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by an insurance company, will not enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract."

Eilenberger v. *Protective Mutual Fire Ins. Co.,* 89 Pa. St. 464.

We will now quote from Story's Agency, Section 452:

"The principal is held liable to third persons, in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances and omissions of duty in his agent, in the course of his employment, although the principal did not authorize, justify, or participate in, or indeed know of, such misconduct, or even if he forbade them or disapproved of them.

"In every such case the principal holds out his agent as competent and to be trusted; and thereby in effect he warrants his fidelity and good conduct in all matters of his agency."

We will now quote from the case of *Wolfe* v. *Pugh*, 101 Ind. 293, 304, wherein the Court says:

"When a principal authorizes an agent to do a certain thing, he is answerable for and bound by the acts and representations of the agent in accomplishing that end, even though the agent is guilty of fraud in bringing about the result. Having given such authority, the principal is responsible for the fraudulent as well as the fair means used by the agent, if they are in the line of accomplishing the object of the agency. Having put the agent in a position where he may perpetrate a fraud upon innocent third parties, the principal will not be allowed, as against such third parties, to retain the fruits of the fraud and defeat a claim of reparation by saying that he justifies the end, but not the means used by the agent. Conceding that the principal is innocent of any active fraud, yet, when a case arises that he or an innocent third party must suffer by the fraud of the agent, the principal, who conferred authority upon the agent, must suffer the loss rather than the innocent third party. This the principal may generally avoid by submitting to a rescision of the contract, and restoring what he may have received as the fruit of the agent's bad faith. To thus bind the principal by the fraud of the agent is not to bind him beyond the scope of the agency. In such a case, the agent does not exceed his authority, but perpetrates a fraud in the exercise of his authority to accomplish the object of the agency, and in such case the principal is liable for the fraud, although he may not have directed it nor had knowledge of it. The

fraud of the agent becomes the fraud of the principal as to third parties."

Wolfe v. *Pugh,* 101 Ind. 293, 304.

We will now quote from the case of *Althorf* v. *Wolfe,* 22 N. Y. 365, which was an action brought by the administrator of one killed by ice thrown from the roof of defendant's house. Fagan, defendant's servant, had been directed to remove the snow from the roof, and without authority from defendant engaged one Cashan to assist. Counsel for defendant requested the Court to charge the jury that if they found that the relation of master and servant did not exist between the defendant and Cashan, and that Cashan actually threw the snow and ice that struck the deceased and caused his death, the defendant was not responsible. The charge was refused, and the Court of Appeals sustained the court below in its refusal. (22 N. Y. 364.) In the same case, Denio, J., said:

"The defendant intrusted the removal of the snow and ice from the roof to one of his servants. I admit that this servant ought not to have taken his friend on the premises, but that he should have done the work himself, and moreover that it was a piece of misconduct to admit Cashan upon the roof; and if Fagan did not know Cashan to be a discreet and prudent man, it was an act of negligence. But the defendant, by giving him charge of the business, and permitting him to have access to the roof, enabled him to take others there. The defendant does not and cannot deny that he is responsible for the negligent and wrongful acts of Fagan. If it had been certain that it was that person, and not Cashan, who threw the piece of

ice which killed the deceased the defendant would clearly have been responsible. Instead of accomplishing the mischief in that manner, Fagan, *by a negligent and improper act,* enabled Cashan to do it. If we keep in mind that the defendant is responsible for the acts of Fagan, and that Fagan took his comrade on the roof, and thus enabled the latter to do the mischief, it is difficult to discover any principle which will shield the defendant from responsibility. It is not necessary to consider Cashan as the defendant's servant. He was rather the instrument by which Fagan, for whose conduct the defendant was undeniably responsible, did the wrong."

Althorf v. *Wolfe,* 22 N. Y. 365.

The case of the *Bank of California* v. *Western Union Telegraph Co.,* 52 Cal. at page 291, quotes very extensively from the above cited case of *Althorf* v. *Wolfe,* and the California case also quotes the following from the opinion in the New York case:

"There is a class of cases where the master is not responsible for the acts of his servant, on the ground that he was not at the time acting in the business of his master, as where he commits a wilful terspass. (1 East. 106; 2 Comst. 479.) But in this case Fagan was in the service of the defendant, even in procuring Cashan to go upon the house. He was not, it is true, serving him properly, or according to his duty; but it was the master's business, and not his own, that he was engaged in."

Bank of California v. *Western Union Tel. Co.,* 52 Cal. 291.

The case of the *Otis Elevator Co.* v. *First National Bank,* 163 Cal. at page 31, says:

"It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business. (Story on Agency, sec. 452; Shearman & Redfield on Negligence, sec. 65; Civ. Code, sec. 2338.) After declaring this to be the rule Story says: 'In all such cases the rule applies *respondeat superior;* and it is founded upon public policy and convenience for in no other way could there be any safety to third parties in dealings either directly with the principal or indirectly through the instrumentality of agents. In every such case the principal holds out the agent as competent and fitted to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency."

Otis Elevator Co. v. *First Natl. Bank,* 163 Cal. 31.

F. I. Ramos held a position of trust and confidence with plaintiff, and this fact was known to defendants' agents, and their giving him money out of their commission, which was contingent upon the sale of this land to the plaintiff, was a wrongful act for which the owners are liable, notwithstanding the fact that they had no knowledge of the transaction.

We will now quote from the case of *Connecticut Mut. Life Ins. Co.* v. *Carson,* wherein the Court says:

"The law is well settled that where the owner of land pays a real estate agent or broker a commission to sell it, and in doing so the agent makes false representations concerning the land which induce a customer to buy, such owner, although unaware of the fraud, when he accepts the bene-

fits of the transaction, is also ladened with the burdens thereof, and in such case the fraud of the agent or broker is chargeable to the owner. *The cases go to the extent of holding an owner for the representations of an unauthorized agent if the owner adopts the trade made and accepts the benefits that flow from the bargain.* The representation complained of, however, must be such as would naturally fall within the apparent scope of the agent's employment. In our case, the false representations were made as to the character and formation of the land, its nearness to a railroad agency, that it did not overflow, and that it had natural drainage. These things might naturally be expected to induce a sale of the property. We find in the case of *Millard* v. *Smith,* 119 Mo. App. loc. cit. 711, 95 S. W. 942, the following quotation which the court in that case said is unquestionably the law:

" 'There is no doubt of the general proposition that, if an agent is employed to effect the sale of lands for his principal, and he does so by means of false representations in respect to the land conveyed, even without the authority or knowledge of his principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized the same.'

"In *Williamson* v. *Tyson,* 105 Ala. 644, 653, 17 South. 336, 339, this language appears:

" 'The general rule of law that one who deals with an agent is bound to know the extent of his authority is fully recognized, and one absolutely necessary to the protection of a principal in all actions brought against him founded upon contracts made by an agent. The doctrine is equally as well established, and rests upon sound principles, that a principal who seeks to avail himself of a contract, made by another for him, whether by an appointed or a self-constituted agent, is bound by the representations made and methods employed by the agent to effect the contract.' Citing many cases.

"There can be no reasonable distinction drawn between a tort brought on through fraud and one brought on through negligence. The principal or master is held where the transaction was concerning his business and from the doing of which he derives benefit. This rule works no hardship on a landowner, because, in the first place, he can select who is to sell his property, and again, before accepting the negotiations of the agent he can inquire of the purchaser as to what representations, if any, the agent made. The reason for such rule is that where one of two innocent persons must suffer, it is nothing but right that the burden be saddled on the one who put it in the power of the wrongdoer to perpetrate the wrong. This entire question is thoroughly discussed in 2 Mechem on Agency (2d Ed.), sections 1984 to 1996, inclusive, preceded by the title, 'Liability for Fraudulent Acts and Representations' (of an agent), where the footnotes to many cases from the different states and England are cited as upholding the rule announced here. We, therefore, hold that the plaintiff is chargeable with the fraud worked on defendant by W. Ross McKnight."

Connecticut Mut. Life Ins. Co. v. *Carson* (Mo., 1915), 172 S. W. 69.

In the case of *Jones* v. *National etc. Assn.*, 94 Pa. St. 215, the Court says:

"The contention on the part of the association plaintiff is, that the secretary had no authority to make the representations by which said Jones was induced to sign the note as surety; that it was, therefore, a fraud and not binding on said association; that is, the latter could repudiate the fraud and yet hold on to its fruits. This cannot be done. Common honesty and the law of the land alike forbid it. Whether the association was incorporated or unincorporated, whether the sec-

retary was or was not authorized to make the representations to Jones, it is clear that the association cannot have the benefit of the security and at the same time repudiate the contract by means of which they obtained it. No principle of law is better settled than that a man cannot reap the fruits of his agent's fraud: *Musser* v. *Hyde,* 2 Watts & S. 314; *Hunt* v. *Moore,* 2 Pa. St. 105; *Mundorff* v. *Wickersham,* 63 Pa. St. 87, 3 Am. Rep. 531; *Keough* v. *Leslie,* 92 Pa. St. 424. The association took this security *cum onere,* and the maxim, *Qui sentit commodum sentire debet et onus,* applies."

Jones v. *National etc. Assn.,* 94 Pa. St. 215.

We will now quote from the case of *Sunbury Fire Ins. Co.* v. *Humble,* 100 Pa. St. 495, wherein the Court says:

"In this conection, it is proper to say that it matters little what were the powers of the agent who made the fraudulent representations by means of which the defendant was induced to take his policy, nor whether the agent himself believed them to be true. The company, having accepted the policy, is affected with any fraud upon the part of the person obtaining it. In other words, it cannot repudiate the fraud and yet retain the benefits of the contract. It takes *cum onere."*

Sunbury Fire Ins. Co. v. *Humble,* 100 Pa. St. 495.

We will now quote from the case of *Busch* v. *Wilcox,* 21 Am. St. Rep. 563, wherein the Court says:

"In other words, if we understand the proposition correctly, it is asserted that when one enters into a contract with a self-constituted agent who has no authority to act for another, and the person for whom the self-constituted agent assumes to act

adopts the contract so made in his name and behalf, thereupon it becomes the duty of the person so treating with the self-constituted agent immediately to notify or inform the principal of the instrumentalities made use of by such self-constituted agent to induce him to enter into the contract. In a case where such contracting party is free from fraud or collusion, and acts in good faith, we do not perceive that such duty is imposed upon him. He had no right to presume that the self-constituted agent has misrepresented facts to him, or that he intends to defraud him. On the contrary, we think it is the duty of the principal, or the person who becomes so by adopting the contract made in his name and for him, to make all needed inquiry and investigation into the facts, acts, and representations of the person who, without authority, has assumed to act for him before he adopts the contract as his own. For in adopting the contract he not only adopts it as written, but he thereby adopts as his acts all the instrumentalities of the self-constituted agent in obtaining the consent of the opposite party to enter into the contract. By adopting the acts of the self-constituted agent, he seeks to appropriate to himself all the benefits to be derived from it as fully as if he had himself induced it in the first instance, and with this he must assume all the liabilities which attach to it: *Wilson* v. *Tumman,* 6 Man. & G. 236; *Morse* v. *Ryan,* 26 Wis. 356; Kerr on Fraud and Mistake, 111; Bigelow on Fraud, 367; Broom's Legal Maxims, 708; Wharton on Agency, secs. 89, 90; *Fitzsimmons* v. *Joslin,* 21 Vt. 142, 52 Am. Dec. 46; *Baker* v. *Union Mut. L. Ins. Co.,* 43 N. Y. 283; *Elwell* v. *Chamberlin,* 31 N. Y. 611; *Presby* v. *Parker,* 56 N. H. 409; *Garner* v. *Mangam,* 93 N. Y. 642; *Bennett* v. *Judson,* 21 N. Y. 238; *Carpenter* v. *Insurance Co.,* 1 Story 57; *Mundorff* v. *Wickersham,* 63 Pa. St. 87, 3 Am. Rep. 531; *Coleman* v. *Stark,* 1 Or. 115. * * *

"The law, as we conceive it to be, is this: When a person deals with an authorized agent, he is bound to inquire and ascertain the extent and limit of his authority to bind the principal, and the principal is bound by all acts of the agent within the scope of his authority; and when a principal adopts the contract of a self-constituted agent who has assumed to act for such principal without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf, and the principal, when he becomes such by adopting his acts, is bound by all acts within the scope of the assumed authority; and in both cases the liability of the principal extends to the frauds or misrepresentations of the agent committed or made while acting within the scope of the real or assumed authority. We entertain no doubt upon the law that should govern the case."

Busch v. *Wilcox* (82 Mich. 336), 21 Am. St. Rep. 563.

We will now quote from the case of *Griswold* v. *Gebbie,* 12 Am. St. Rep. 878, wherein the Court says:

"The point that the plaintiff in error was not liable for the statements of her agent, John Griswold, is not tenable. The general rule that a principal is responsible for the misrepresentations of his agent, within his authority, is beyond question; and the better opinion is, that as to third parties affected by his acts or words, it is the apparent scope of his authority, and not his actual instructions, that must govern. That is the basis on which the business of the world in the present day is transacted, and the rule should be enforced in a liberal spirit, with regard to the actual habits of the community."

Griswold v. *Gebbie* (126 Pa. St. 353), 12 Am. St. Rep. 878.

We will now quote from the case of *Bennett* v. *Judson,* 21 N. Y. 238, wherein the Court says:

> "A vendor of land is responsible for material misrepresentations in respect to its location and quality, made by his agent without express authority and in the absence of any actual knowledge by either the agent or the principal, whether the representations were true or false."
>
> *Bennett* v. *Judson,* 21 N. Y. 238.

We will now quote from the case of *Mayer* v. *Dean et al.,* 5 L. R. A. 540, wherein the Court says:

> "It is consonant with reason and justice that a principal should not be allowed to profit by the fraud of his agent; and if he adopts the contract made in his behalf, although ignorant of the fraud, he should be held liable to make compensation to the party injured by it."
>
> *Mayer* v. *Dean et al.* (N. Y., 1889), 5. L. R. A. 540.

We will now quote from the case of *J. I. Case Threshing Mach. Co.* v. *Lyons & Co.,* 138 Pac. 167, in which the Court says:

> "One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent ratifies the act, and takes it as his own, with all its burdens, as well as all its benefits. *U. S. F. & G. Co.* v. *Shirk et al.,* 20 Okl. 576, 95 Pac. 218; *Jack* v. *National Bank of Wichita,* 17 Okl. 430, 89 Pac. 219; *Fant* v. *Campbell et al.,* 8 Okl. 586, 58 Pac. 741."
>
> *Case Threshing Mach. Co.* v. *Lyons & Co.,* 138 Pac. 167.

We will now quote from the case of *Wilson* v. *Mc-*

Carthy et al., 134 Pac. 1189, wherein the Court says:

> "The doctrine is well established and rests upon sound principles of law that a person who seeks to avail himself of a contract made by another for him, whether by appointment or by a self-constituted agent, is bound by the representations made and the methods employed by the agent to effect a contract. Defendant Nellie M. Rogers cannot ratify a part of the transaction negotiated by McCarthy and repudiate the same in part. *Grover* v. *Hawthorne Estate,* 62 Or. 65, 116 Pac. 100, 121 Pac. 804, and cases there cited; *Elwell* v. *Chamberlin,* 31 N. Y. 611, 619; *Haskell* v. *Starbird,* 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809; *Busch* v. *Wilcox,* 82 Mich. 336, 47 N. W. 328, 330, 21 Am. St. Rep. 563; *Griswold* v. *Gebbie,* 126 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878."
>
> *Wilson* v. *McCarthy et al.* (Ore., 1913), 134 Pac. 1189.

In *Taylor* v. *Commercial Bank,* 174 N. Y. 181, 188, 66 N. E. 726, 728 (62 L. R. A. 783, 95 Am. St. Rep. 564), Judge Martin expressed, with care and precision, the principle determinative of the question whether or not the complaint was erroneously dismissed, as follows:

> "It is an established principle of law that, where a person acts for another who accepts the fruits of his efforts, the latter must be deemed to have adopted the methods employed, as he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the fraud by means of which they arose."
>
> *Taylor* v. *Commercial Bank,* 174 N. Y. 181, 188, 66 N. E. 726, 728 (62 L. R. A. 783, 95 Am. St. Rep. 564).

We will now quote from the case of *Day* v. *Merrick,* 138 N. W. 400, wherein the Court says:

> "Furthermore, there is abundant evidence to sustain the proposition that the defendant ratified the fraudulent acts of his agent Hicks. By accepting the benefits of the transaction, he bound himself by the representations, and particularly is this true where the principal knows what such representations were, as did the defendant here. *Higbee* v. *Trumbauer,* 112 Iowa 74, 83 N. W. 812; *Lull* v. *Bank,* 110 Iowa 537, 81 N. W. 784; *Deering* v. *Bank,* 81 Iowa 222, 46 N. W. 1117; *Eadie, Guilford & Co.* v. *Ashbaugh,* 44 Iowa 519; *Busch* v. *Wilcox,* 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563. That his cause should have been submitted to the jury is very clear to us.
>
> See *Lenoch* v. *Yoss,* 136 N. W. 542."
>
> *Day* v. *Merrick* (Iowa, 1912), 138 N. W. 400.

PLAINTIFF'S ARGUMENT TO THE POINT THAT ALL REPRESENTATIONS MADE TO HER WERE STATEMENTS OF FACT, AND SUCH AS SHE WAS ENTITLED TO RELY UPON, EVEN HAD THERE BEEN NO CONFIDENTIAL RELATION.

Plaintiff contends that all of the representations made to her by defendants, or their agents, were statements of fact upon which she, by the law, had a right to rely, and she had the right to rely upon them even though she had been dealing at arm's length with the defendants. Defendants and their agents represented to plaintiff that the land in question was first class alfalfa land; that it was all clear; that it was all level; that it was all protected from overflow by levee; that it was all river bottom land; that it was all sub-irrigated; that none of the land required irrigation for the growth of alfalfa, and that all of said

land was of such a character that it would produce five and six cuttings to the year, and the yield would be from eight to ten tons per acre each season. Those representations were statements of fact and could be relied upon by any person dealing with the defendants at arm's length and could be relied upon by an experienced man who then and there had the opportunity of examining the land. Defendants seek to contend that those representations, on the part of defendants and their agents, were in effect nothing more than what is known in law as "puffing" or "dealers' talk" and as such amounted to mere expressions of opinion and being but statements of opinion, plaintiff had no right to rely upon them, and it is their contention that it was up to the plaintiff to know about, and understand, those conditions or ascertain the true facts in reference thereto, independent from what they themselves stated to her.

This, we contend, is not the law. We contend, and we will substantiate our contention by the very latest and best authorities, that the statement that the land is all clear and level, is a statement of fact upon which plaintiff had a right to rely. We will show that the statement of the vendors and their agents, that the land consisted of 600 acres was a statement of fact upon which plaintiff had a right to rely, without any survey or investigation to verify the statement. We will show that the statements as to the extent of the crops produced was a statement of fact upon which plaintiff had a right to rely. We will show that the statement that the land was all sub-irrigated and that no irrigation

was necessary, was a statement of fact upon which the plaintiff had a right to rely. We will show that the statement that all of said land was river bottom land was a statement of fact upon which plaintiff had a right to rely. All of these representations were not a mere expression of opinion but were statements of definite, concrete facts, and we will go further and show that the statement that the land was first class alfalfa land, under the facts and circumstances of this case, was not a mere expression of opinion, but was also a definite statement of fact and as such definite statement of fact, could be relied upon by the plaintiff. We wish to state right here that the purpose of this brief is to establish the fact that plaintiff had a right to rely upon those representations, even though she had been dealing at arm's length, and for the purpose of this argument, we are assuming (which is not the case) that the plaintiff was actually dealing upon the same footing, at arm's length, and upon equal terms with the defendants. In other words, we are assuming that she was a man having as much experience as the defendants or their agents and that there was no confidential relationship existing between them or involved in the transaction; and, we will here state, that in practically all of those cases which the defendants will cite to support their contention, that the representations made to the plaintiff were nothing but mere "puffing," the statement of the doctrine is qualified by the statement that the rule is different where confidential relations exist. In other words, while "puffing" and "dealers' talk" and ex-

aggerated statements as to value or conditions, or future prospects, will, in certain cases go all right with a stranger dealing at arm's length, they nevertheless do not go where the person is not upon the same footing. The tendency of the modern cases is to restrict, rather than extend, the doctrine of *caveat emptor,* and the doctrine of *caveat emptor,* is, in all cases, more applicable to sales of personal property with personal present investigation, rather than in the sale of real property, such as in the case at bar. As the Court says in a case hereinafter quoted from, "the unmistakable drift is toward the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim." And as the Court says in another case which we will quote from, "there is no rule in law which required men, in their business transactions, to act upon the presumption that all men are knaves and liars". There was no duty upon plaintiff to have the statements of defendants or their agents verified. She had a right to believe them, and she had a right to believe them even though she had been dealing at arm's length.

The case of *Boltz* v. *O'Conner,* an Indiana case, decided in 1910, reported in 90 N. E. 496, was an action wherein the purchaser gave his seller a check for $2,000, as earnest money on a contract for the sale of real property. After giving the check, but before it was cashed, the prospective purchaser discovered that the representations that had been made to him were not true, and he stopped payment on the check. The

vendor brought an action on the contract and the purchaser set up the defense that the check and his signature of the contract were procured through fraud, misrepresentation and deceit. The plaintiff demurred to his answer and the purchaser refusing to further plead, judgment went against him on the demurrer, from which judgment the purchaser appealed. In the opinion the purchaser is referred to as the appellant and the vendor is referred to as the appellee.

Appellant's answer in the trial court alleged, as grounds for relief, "that the soil of said real estate was not very productive, and it was not rich; that it was not a deep black, rich soil; that said real estate was not the richest in White County, and was not of the value of $19,000, nor of the value of more than $12,000; that the soil of said real estate was and is poor; that it is sandy, and the sand and gravel come up to near the surface of the ground, all of which appellee well knew at the time said representations were so made by him and his agent."

The trial court held that appellant's allegations in his answer did not constitute a defense and thus sustained plaintiff's demurrer, but the appellate court held otherwise, and in the latter portion of the opinion says:

> "The next question for our consideration is whether representations that the soil was very productive, was rich, was deep, rich, black soil are representations of fact or merely expressions of opinion. The terms, 'rich soil', 'very productive', 'deep, black soil', when used in describing real estate, have certain definite meanings. 'Rich' is defined in this connection as fertile, fruitful;

producing or yielding abundantly, as rich soil, etc., of great price or money value; abounding in desirable or effective qualities or elements; of superior quality; opposed to poor (Cent. Dict.); yielding large returns; productive or fertile; fruitful, as rich soil or land. It is the opposite of poor (Webster's Dict.). It is hardly necessary to cite these definitions, as they are matters of common knowledge, understood by every one; and, in our opinion, the representations that the soil is rich; that it is fertile; that it is very productive—is the statement of a fact, unless qualified in some manner that would indicate that only an opinion or estimate was intended. It has been held in this state that such representations may be representations of facts. *Harris* v. *McMurray,* 23 Ind. 9. The descriptive terms used were material, directly affecting the value of the land. *Harris* v. *McMurray, supra; Norris* v. *Tharp et al.,* 65 Ind. 47.

"For the foregoing reasons we hold that the second paragraph of answer and the counterclaim were sufficient to entitle appellant to the relief asked, and the demurrers thereto should have been overruled.

"Judgment reversed with instructions to overrule the demurrers to said paragraphs and further proceedings not inconsistent with this opinion."

Boltz v. *O'Conner,* 90 N. E. 496.

The case of *Wooddy* v. *Benton Water Co.,* 102 Pac. 1054, 132 Am. St. 1103, a Washington case decided in 1909. This is an action wherein the purchaser brought suit to recover for damages for false representations as to the quantity of land, and also as to the number of acres susceptible of irrigation from a certain canal. The trial court granted defendant's motion for

nonsuit and the Supreme Court, in passing upon the purchaser's appeal, said:

> "Nor can we agree with the court below that the doctrine of *caveat emptor* applies to the representations made by the respondents to the effect that the entire tract was under the level of the canal and susceptible of irrigation therefrom. Strong language has been used by this and other courts in defining the duties of purchasers from which it might be inferred that vendors have an unbridled license to lie and deceive, but such has never been the law, and the tendency of the more recent cases has been to restrict rather than extend the doctrine of *caveat emptor.* Thus, in *Strand* v. *Griffith,* 97 Fed. 854, 38 C. C. A. 444, the Court said: 'There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act upon that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' "

In *Noyes* v. *Belding,* 5 S. D. 603, 59 N. W. 1069, the Court said:

> "The unmistakable drift is toward the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim": See also *Watson* v. *Molden,* 10 Idaho, 570, 79 Pac. 503, and cases there cited.

In 14 American and English Encyclopedia of Law, second edition, pages 120, 121, the rule is thus stated:

"By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge, or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself. By the weight of authority and in reason, the rule that a person who is voluntarily blind as to facts concerning which false representations are made cannot complain of the same, applies only where the parties have equal present opportunity and means to ascertain the truth at the time of the transaction, and does not apply merely because it is possible to ascertain the facts. Indeed, it has been held that a person is justified in relying on a representation made to him, in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth."

In *McMullen* v. *Rousseau,* 40 Wash. 497, 82 Pac. 883, this Court said:

"The main contention of the appellants is that this case comes within the rule often announced by this court that, where the vendor and purchaser are dealing at arm's length, and where the subject matter of the sale is at hand, the purchaser must protect himself and cannot rely upon representations made by the vendor. This rule is firmly established where the representations relate to the subject matter of the sale which is at hand, or to other facts the truth of which may readily be ascertained by the exercise of ordinary care and prudence. But the converse of this rule is equally well established where the subject matter of the

sale is not at hand, so that the truth or falsity of the representations concerning it may be ascertained, or where the representations relate to facts within the knowledge of one of the parties, and the truth or falsity of such representations cannot be ascertained by the other party upon reasonable investigation or by the exercise of reasonable care and prudence. Such are the cases of *O'Connor* v. *Lighthizer,* 34 Wash. 152, 75 Pac. 643, *Mulholland* v. *Washington Match Co.,* 35 Wash. 315, 77 Pac. 497; *Stack* v. *Nolte,* 29 Wash. 188, 69 Pac. 753, and *Lawson* v. *Vernon,* 38 Wash. 422, 107 Am. St. Rep. 880, 80 Pac. 559."

McMullen v. *Rousseau,* 40 Wash. 497, 82 Pac. 883.

In the case of *Sargent* v. *Barnes,* 159 S. W. 366, at page 373, the court held that the following were representations of fact and not matters of opinion. Quoting the opinion:

"The testimony shows that appellee wanted to purchase first-class farming lands, which he intended to leave to his children; that he repeatedly told Norvell that he did not want any other kind or class of land; that he was an old man, unfamiliar with lands in Texas, and was compelled to rely upon his statement as to the character and nature of the land; that he did not want land that would overflow. It is shown that Norvell stated to him that the land was first-class farming land; that only about 2,000 to 3,000 acres thereof would overflow, and that during excessive storms from the Gulf. While there is some conflict in the evidence, these statements were shown to be untrue. At times all of said ranch would overflow, it appearing that it was covered with driftwood; that only about 1,000 acres thereof was good farming land, the balance being covered with wire or salt

grass, and was only fit for winter pasture, and was of far less value than it would have been if the representations had been true. We think the evidence satisfactorily shows that Norvell had authority and was expressly authorized by James Rugeley, the manager of this property, to sell same; and the circumstances also justify the conclusion that Mrs. Sargent and Mrs. Rugeley were cognizant of the fact that Norvell was undertaking to make a sale of the ranch to appellee and acquiesced therein."

Sargent v. *Barnes* (Tex., 1913), 159 S. W. 373.

In the case of *Allen* v. *Henn,* 64 N. E., page 250, the following representations were held to be material and not of opinion. Quoting from the opinion of Chief Justice Magruder:

"The contract so made between Allen and Henn was induced by the wrongful and fraudulent representations of Allen, made to Henn and his wife. The representations so made by Allen were to the effect that the tract of 290 acres was first-class, high, dry, river-bottom land, not subject to overflow; that it had not been overflowed within 10 years; that it was covered by very valuable saw timber, which had never been culled, consisting of hickory, white oak, burr oak, ash, sycamore, and other varieties of timber; that it was all virgin forest, except 40 acres, which 40 acres Allen wrongfully and fraudulently represented to be in a high state of cultivation; that the entire tract of 290 acres was worth and would sell for $27 per acre in cash; and that the timber thereon could be readily sold to meet the payment of all of said notes as they matured."

Allen v. *Henn* (Ill., 1902), 64 N. E. 250.

We will now quote from the case of *Ross* v. *Sumner,* 78 N. W. 264, wherein the Court says:

> "Plaintiff alleges as ground for relief and he so testified on the trial, that Mr. Sumner, during the negotiations for the exchange, represented to plaintiff that his land was level, consisted of a single tract, was worth at least $50 per acre, was all under ditch, and could be easily irrigated, was good fruit land, and could all be cultivated. The defendant denies making the representations imputed to him, but plaintiff's version of the transaction is in several important particulars corroborated by the testimony of H. B. Strout, who, both parties agree, was present during a portion of the time the trade was being negotiated. * * * These representations, which were shown to be false and untrue, were of a material character; and, having been relied upon by plaintiff, were sufficient cause for the rescission of the contract, and for the interposition of a court of equity."
>
> *Ross* v. *Sumner et al.* (Neb., 1899), 78 N. W. 264.

We will now quote from the case of *Sikes* v. *Reiher,* 91 N. W. 920, wherein the Court says:

> "It is true, as urged by counsel, that mere representations of value will not ordinarily sustain a charge of fraud or false representations; and, were that the only question here, there would be no room for argument. But these representations go much further, and include statements as to the topography of the tract, the presence of valuable timber, the tillable quality of the soil, and other things which are not to be regarded as mere matters of opinion, but are matters of fact pertinent to the negotiations; and plaintiff could rightfully rely thereon."
>
> *Sykes* v. *Reiher* (Iowa, 1902), 91 N. W. 920.

In the case of *Neely* v. *Rembert,* 71 S. W. 259, the Court, in stating the rules by which representations should be judged, to be either material or of opinion, says:

> "In this view appellee's case meets every test prescribed by this court for maintenance of suits of this character, which tests are as follows: '(a) Was the fraud material to the contract? Did it relate to some matter of inducement to the making of the contract? (b) Did it work an injury? (c) Was the relative position of the parties such, and their means of information such, that the one must necessarily be presumed to contract upon the faith reposed in the statement of the other? (d) Did the injured party rely upon the fraudulent statement of the other, and did he have the right to rely upon them in full belief of their truth?' *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546. The representations, or rather misrepresentations, of Neely, as to the area of the plantation, were material. He represented, by his deed, that the plantation conveyed contained 3,078.05 acres, more or less. The actual survey showed 2,545 acres, or a difference of .533 acres. He represented the cleared land in actual cultivation to be 1,100 or 1,200 acres, whereas the actual survey showed 900 acres. Rembert wanted a plantation that contained at least 3,000 acres of land susceptible of cultivation. Instead he gets a plantation containing 2,545 acres in all, and with not more than 1,500 or 1,800 susceptible of cultivation. These discrepancies are too great to be remedied by abatement in the purchase price or by suit on warranty. They go to the very foundation of the contract of purchase, and shatter it. They were material inducements to the contract, and were such as to deprive the appellee substantially of the benefits of his purchase. *Fitzhugh* v. *Davis,* 46 Ark. 337. The same may be said also of the

representations concerning the cocoa grass. *Oswald* v. *McGehee,* 28 Miss. 340.

Appellant contends that the false representations are not ground for equitable relief in this action, 'unless the vendor knew them to be false and the vendee had no means of discovering their falsity.' This is not the law applicable to positive statements or representations of fact (and not of opinion) which were substantial inducements of the contract. 'A vendor who makes a false statement regarding a fact material to the sale, either with knowledge of its falsity or in ignorance of its falsity, when, from his special means of information, he ought to have known it, and thereby induces his vendee to purchase to his damage, is liable in an action at law for the damage the purchaser sustains through the misrepresentation, or to have the sale rescinded in a suit in equity, at the option of the purchaser."

Neely v. *Rembert* (Ark., 1902), 71 S. W. 259.

In the case of *Best* v. *Offield,* 110 Pac. 17, the facts were as follows:

Plaintiff and wife were unfamiliar with farm lands and the fruit business. They purchased a farm from defendants who misrepresented it as to the amount of land and the different varieties of fruit in the orchard, quality of fruit that would be produced, and as to the sufficiency of water to irrigate the farm. The Court, in deciding the case, says:

"There is a difference between the right of a vendee to rely upon the representations of the vendor where the means of determining the truth of the representations are at hand and it is easily determined, as in the case just cited, and a case of this kind where, as shown by the testi-

mony, these plaintiffs were entirely unfamiliar with the fruit business, having come from a locality where orchards were not grown. They stated to the defendant at the time of the transaction that they knew nothing about the business, and when they were down examining the orchard, told him that they did not know a peach tree from a cherry tree, and in many instances he pointed out to them the difference in the trees.

This case falls more squarely within the rule of law announced in *Wooddy* v. *Benton Water Company,* 54 Wash. 124, 102 Pac. 1054. There the action was instituted to recover damages for false representations made by the defendants in the negotiations leading up to the contract of sale, both as to the quantity of land to be conveyed and the number of acres susceptible of irrigation from the water company's canal by gravity flow. The defendants represented that the tract to be conveyed by the water company contained 60 acres in all, and that the 60 acres were so situated in reference to the water company's canal that the entire tract could be irrigated therefrom by gravity flow. It eventuated that in fact the tract contained only 52.64 acres, and 28.24 acres of this were above the level of the canal and could not be irrigated therefrom. It also appeared that the purchaser visited the land accompanied by certain of the grantors and viewed the premises in a general way. But it appeared that the portion of the land which could not be irrigated from the canal could only be ascertained by an accurate survey, as, we think, it appears in this case that the area of this orchard could only be obtained by an accurate survey. The Court in the trial of that case, upon the close of the plaintiff's testimony, granted a nonsuit to the defendant."

Best v. *Offield* (Wash., 1910), 110 Pac. 17.

In the case of *Swayne* v. *Waldo,* 33 N. W. 78, the Court found that the defendants "represented and warranted the lands to be choice, well-lying land, and in every respect first-class farm land, lying within about two miles of O'Connor, Nebraska," and that such representations were of material facts and not of opinion.

In the case of *Strand* v. *Griffith,* 97 Fed. Rep. 854, the Court says:

> "The law will not reward dishonesty and falsehood, and punish confidence and trustfulness, in any such way. The rule of *caveat emptor* is not founded on the highest standard of morals, but it is no longer a shield and protection to the deliberate frauds and cheats of sharpers. Where falsehood or deceit is practiced by the vendor for the purpose of throwing the purchaser off his guard, and inducing him to make the purchase without first making personal examination of the thing purchased, which, but for such fraudulent practices, he would have done, it does not lie in the mouth of the vendor to say that by giving credit to his false and fraudulent representations the purchaser must be held to have been cheated and defrauded as the result of his own negligence and credulity. * * *
>
> The vendor cannot complain that the purchaser relied too implicitly on the truth of representations he himself made, knowing them to be false, but intending that they should be received and acted upon by the purchaser as true."
>
> *Strand* v. *Griffith,* 97 Fed. Rep. 854.

We will now quote from the case of *Hale* v. *Philbrick,* 42 Iowa, 81, wherein the Court says:

"We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood."

Hale v. *Philbrick,* 42 Iowa 81.

In the case of *Reynell* v. *Sprye,* 1 De Gex, M. & G. 549, the Court said:

"However negligent the party may have been to whom the incorrect statement has been made, yet, that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of things he has himself stated."

Reynell v. *Sprye,* 1 De Gex, M. & G. 549.

We will now quote from the case of *Hoock* v. *Bowman,* 60 S. W. 389, wherein the Court says:

"The purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property when the facts concerning which the representations are made are unknown to the vendee; and if a vendor makes material representations as to the character, quality, and location of his real estate, and the vendee believes, relies and acts upon these representations and they turn out to be false, the vendor cannot then shield himself from the consequences of his fraudulent conduct by interposing the plea of laches on the part of his vendee. This rule is supported by all the authorities. Where one assumes to have knowledge of a subject of which another may be ignorant, and knowingly makes false statements regarding it, upon which the other relies to

his injury, the party who makes such statements will not be heard to say that the person who took his word, and relied upon it, was guilty of such negligence as to be precluded from recovering compensation for injuries which were inflicted on him under cover of falsehood. *Eaton* v. *Winnie,* 20 Mich. 156. The omission by one of the parties to an agreement to make inquiries as to the truth of facts stated by the other cannot be imputed to him as negligence. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement."

Hoock v. *Bowman* (Neb., 1894), 60 N. W. 389.

In the case of *Dwinell* v. *Watkins et al.,* 126 N. W. 304, the facts were as follows:

Defendant Dwinell and his wife kept a rooming house and grocery store and being desirous of disposing of the property, employed one Loman, as agent to find a purchaser. Loman, who, it afterwards appeared, was a friend of the plaintiff and also acting as his agent in disposing of his farm property. Loman, acting under dual capacity as agent of both parties, brought them together and went out to the ranch of Watkins. During this time, defendant did not know that Loman was also acting as the agent for Watkins. The land was represented to be all good tillable land; that there were only 85 acres under cultivation, but that it could all be cultivated and that Loman also stated the land to be worth $6,500. Upon these representations an exchange of properties was effected. It

afterwards turned out that the land was mostly sandy and gravelly, and that only a small portion of it was susceptible to cultivation. The Court, in deciding the case, says:

> "But he contends that no fraud has been shown; that when parties are negotiating for property which they are afforded an opportunity to examine and which they do examine each has the right to exalt the value of his property and depreciate the value of the other's, and that such assertions of value do not amount to fraudulent representations. He also contends that both parties knew that Loman was the agent of both, hence there was no deception as to his relation to the parties. On the other hand, the defendants contend that the representations of Dwinell and Loman as to the condition, quality, and value of the land were statements of a fact made to Watkins after he informed them that he knew nothing about the quality or value of the land, and that he would rely upon their representations; that Loman, while acting ostensibly as his agent, fraudulently dissuaded him from making inquiries, and that if he had known that Loman was acting for Dwinell he would not have relied upon his statements, and would have made other investigations."
>
> *Dwinell* v. *Watkins* (Neb., 1910), 126 N. W. 304.

In the case of *Oneal* v. *Weisman,* a Texas case decided in 1905, reported in 88 S. W., at page 290, the Court says:

> "Appellant objected to the admission of Weisman's testimony that Oneal told him prior to the trade that the Morris county land was good, fertile land, very productive, would raise corn,

cotton, fruits, and vegetables, and was well worth $15 per acre; that there was a sawmill running daily, and it was in good order and of the value of $5,000. The objections were that plaintiff's pleadings were not verified—there being a plea of failure of consideration—and such evidence was irrelevant and immaterial, and its tendency was to prejudice the defendant's case. The rule is that, where a party is trying to effect a sale of his property, it seems, he has the right to puff the same in the most extravagant manner, and to exalt the value to the highest point the vendee's credulity will bear. The vendee in such cases is not expected to place confidence in such statements, and, if he does, it is not sufficient upon which to base an action for damages, it matters not how false they may be. Such statements are regarded as mere opinions, and the purchaser is not expected to rely thereon, but must rely on his own judgment. The foregoing is based on the proposition that the parties to a contract stand upon an equal footing, and their opportunities for knowing the facts or forming judgment as to the true condition of the property are equal. Where, however, there is a fiduciary relation existing between the parties, or where the situation of one of the parties is such that he has not an equal opportunity of forming a correct judgment and is ignorant of the true conditions, but is induced to rely upon such statements and to purchase by reason of his faith therein, then 'the vendor may be held liable as for false representations, because by them the purchaser has fraudulently been induced to forbear inquiry as to their truth.' Warvelle on Vendors, sec. 946, vol. 2. As it is difficult at times to distinguish opinions from statements of facts, the general rule as above stated must be accepted with some qualification. Mr. Warvelle, sec. 947, states the distinction as follows: 'Thus, if the vendor, knowing them to be untrue, makes statements with the intention of misleading the

vendee, and if the latter, relying upon them, is misled to his injury, or if he induces the vendee not to make inquiries with respect to value, or any extrinsic facts affecting values, or makes statements in such a manner that the vendee, instead of being put on inquiry, is put off his guard, it has been held that a substantial right to recover damages is created, or the vendee may, at his option, avoid the contract. To effect this, however, the representations must, as a rule be coupled with other circumstances, as where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing and where he is induced by the vendor's artifice to forbear inquiries which he would otherwise have made; but whether a representation as to value is merely an expression of opinion or belief, or an affirmation of fact to be relied on, is a question for the jury, and should properly be left to their decision. Again while the purchaser must rely upon his own judgment in questions of value, yet, in regard to any extrinsic facts affecting the quality or value of the subject of the contract, he may rely upon the assurances of the vendor; and, if he does so rely, and those assurances are fraudulently made to induce him to enter into the contract, he may maintain an action for the injury sustained.' * * * As to the statements of Oneal as to the fertility, etc., of the land, and as to the qualities of the sawmill, we think such were statements of facts, which, if false, and were relied on and induced the purchase by Weisman, were admissible in evidence. But whether or not they would constitute fraud, and be sufficient upon which to base an action of deceit, depends upon whether or not the situation under the circumstances surrounding the parties warranted Weisman in relying on such statements, and that he did so rely thereon. If the facts show that he was not so warranted, or did not rely thereon, then the court should have excluded said

testimony, though it had been admitted before the facts were fully developed. If it does not conclusively appear, then it is a question to be submitted to the jury."

Oneal v. *Weisman* (Tex., 1905), 88 S. W. 290.

We will quote from the case of *Connecticut Mut. Life Ins. Co.* v. *Carson,* 172 S. W. 69. This is a Missouri case, decided in December, 1914. This is a very recent case, being but a few months old. This case was a dispute between vendor and purchaser, in which the purchaser had been misled by false representations made by the vendor's agent. Relief was granted to the purchaser upon the grounds that the purchaser had been misled to his damage. In this case the purchaser is referred to as the defendant, the vendor is referred to as the plaintiff. The agent was a person by the name of McKnight. This case decides that a circular or prospectus describing real property may be admitted in evidence. This case also holds that it makes no difference whether the agent, in making the false representations, knew them to be false. It is sufficient if he merely made them recklessly and without sufficient information or justification. The Court holds that it is no answer to the suit of the purchaser that the plaintiff's agent believed the representations which he made were true; and this case also holds that where the owner of land pays a real estate agent or broker a commission in the sale of it, and in that sale the broker made false representations, the owner, although unaware of the fraud, is chargeable therewith, and the owner is held to be

chargeable with the fraud notwithstanding the fact that he did not authorize it.

The opinion reads:

> "The defendant saw the advertisements of W. Ross McKnight's scheme printed in one of the St. Louis daily newspapers. He was a clerk working in East St. Louis on a salary, and was not familiar with farming or agricultural land and so informed McKnight. He called on McKnight after reading the advertisement and received a prospectus of the scheme and a circular with McKnight's name stamped upon it. This circular was one put out by the plaintiff, a number of them having been turned over to McKnight by Collins when they perfected the arrangement to deed the lands. The prospectus issued by McKnight contains many things contained in the circular issued by the plaintiff. It covers 10 pages of the printed abstract, and under heavy headings it takes up, first, a description of the general nature of the scheme, then a description of Southeast Missouri and Stoddard county, followed by headings such as, 'Soil, Water and Rainfall,' 'Crops and Stock Growing,' 'Climate,' 'Topography,' 'Tract Selected,' 'The Colony,' and, lastly, the terms of settlement. It contains many representations which are promissory in nature and many that might come under the term 'puffing,' and others that border closely on representations of existing facts. The defendant was given an application to sign, entitling him to become a purchaser in the colonization scheme. Defendant went with McKnight and looked over the land on a rainy day when the soil appeared black or dark. The natural color of the soil when dry was light. Defendant says, and we have no reason for doubting him, that W. Ross McKnight made the following representations, which were relied on by him, and which induced him to become a purchaser: That the lands were all well

drained, and that this was not true; that arrangements had been made with the Iron Mountain Railway Company to place an agency at Reeds Spur, which was very near plaintiff's property, and that at the time of the trial, which was several years after the representation was made by McKnight, no such agency had been established; that this land would not overflow, and that it does overflow.

"(1) We are convinced, after reading the evidence, that these representations were untrue and were false, and that McKnight knew they were false, or did not have sufficient knowledge on the subject to warrant him in asserting that they were true. This brings his conduct within the rule laid down in *Ray County Savings Bank* v. *Hutton,* 224 Mo. loc. cit. 70,123 S. W. 47, that a statement made carelessly without caring whether it be true or false, which proves to be untrue, is fraud, and such as that an action for fraud and deceit can be maintained by one damaged thereby. See, also, *Peters* v. *Lohman,* 171 Mo. App. 465, 156 S. W. 783, and cases cited.

"It is true that a great many of the representations made by McKnight to defendant were in the nature of promises or descriptions of what would take place, and others that would probably escape criticism in an action for fraud, and deceit because they were mere 'puffing,' and these of course, standing alone, would not sustain a charge of fraud. But where statements of existing facts are made by one knowing them to be untrue, or made carelessly, not caring whether they are true or false, followed by one being induced thereby to part with money to his damage, this will sustain an action for fraud and deceit. It is no answer to say that McKnight had faith in his project or believed in his scheme, or that he himself lost a large sum of money in trying to put it through. Such a defense would make possible the perpetration of the most flagrant frauds

and permit the wrongdoer to go free because he would say he believed what he was saying. Ordinary sensible men require something of substance on which to base belief and not a mere fancy or an imagination; an expression based on such 'belief' amounts to recklessness.

"(2) In order to hold plaintiff for McKnight's fraudulent representations, we must examine the relation that existed between them. Collins was the *alter ego* of the plaintiff in this matter, and he says that W. Ross McKnight sold this property to defendant as the agent of the plaintiff, and that plaintiff paid him a commission for making the sale. McKnight was the only party that defendant dealt with, and it was McKnight who delivered plaintiff's warranty deed and carried out the contract made on December 31st, evidenced by the receipt showing that the lands were owned by plaintiff, and that it would make a warranty deed; and it was McKnight who accepted the first payment for the land, together with the notes for the remainder, which were made payable to the plaintiff and secured by a deed of trust, all of which were delivered by McKnight to the plaintiff. Plaintiff afterwards wrote from its home office in Connecticut, demanding payment of the notes and interest as it became due. And finally, after defendant had advised plaintiff of the representations made by McKnight, plaintiff foreclosed under the deed of trust, which it accepted from McKnight, bought in the property, and then brought suit for damages against the defendant. Enough was shown to evidence the relation of principal and agent. In any event, the plaintiff did accept the benefits of the bargain made by McKnight, sought to enforce the contract, and to this day, so far as the record shows, in no way repudiated the transaction which was put through by McKnight. The law is well settled that where the owner of land pays a real estate agent or broker a commission to sell it, and in doing so the

agent makes false representations concerning the land which induce a customer to buy, such owner, although unaware of the fraud, when he accepts the benefits of the transaction, is also ladened with the burdens thereof, and in such case the fraud of the agent or broker is chargeable to the owner. The cases go to the extent of holding an owner for the representations of an unauthorized agent if the owner adopts the trade made and accepts the benefits that flow from the bargain; the representations complained of, however, must be such as would naturally fall within the apparent scope of the agent's employment. In our case, the false representations were made as to the character and formation of the land, its nearness to a railroad agency, that it did not overflow, and that it had natural drainage. These things might naturally be expected to induce a sale of the property. We find in the case of *Millard* v. *Smith,* 119 Mo. App. loc. cit. 711, 95 S. W. 942, the following quotation which the court in that case said is unquestionably the law:

" 'There is no doubt of the general proposition that, if an agent is employed to effect the sale of lands for his principal, and he does so by means of false representations in respect to the land conveyed, even without the authority or knowledge of his principal, the later is chargeable with such fraud in the same manner as if he had known or authorized the same.'

"In *Williamson* v. *Tyson,* 105 Ala. 644, 653, 17 South. 336, 339, this language appears:

" 'The general rule of law that one who deals with an agent is bound to know the extent of his authority is fully recognized, and one absolutely necessary to the protection of a principal in all actions brought against him founded upon contracts made by an agent. The doctrine is equally as well established, and rests upon sound principles, that a principal who seeks to avail himself of a contract made by another for him,

whether by an appointed or a self-constituted agent, is bound by the representations made and methods employed by the agent to effect the contract.' Citing many cases.

"There can be no reasonable distinction drawn between a tort brought on through fraud and one brought on through negligence. The principal or master is held where the transaction was concerning his business and from the doing of which he derives benefit. This rule works no hardship on a landowner, because, in the first place, he can select who is to sell his property, and again, before accepting the negotiations of the agent he can inquire of the purchaser as to what representations, if any, the agent made. The reason for such rule is that where one of two innocent persons must suffer, it is nothing but right that the burden be saddled on the one who put it in the power of the wrongdoer to perpetrate the wrong. This entire question is thoroughly discussed in 2 Mechem on Agency (2d ed.), sections 1984 to 1996, inclusive, preceded by the title, 'Liability for Fraudulent Acts and Representations' (of an agent), where in the foot-notes many cases from the different states and England are cited as upholding the rule announced here. We, therefore, hold that the plaintiff is chargeable with the fraud worked on defendant by W. Ross McKnight."

Connecticut Mut. Life Ins. Co. v. *Carson* (Mo. 1915), 172 S. W. 69, 186 Mo. 221.

We will now quote from the case of *Post* v. *Liberty,* 121 Pac. 475, wherein the Court says:

"Having determined, as we do, that the plaintiff established the facts claimed by them, with reference to the representations made by defendant respecting the location of the east boundary line of the land which he sought to sell, that they did not know the location of the land, but

relied upon the representations made by defendant, believing them to be true; that they would not have purchased the land had they known that more than 200 acres lay east of the road, and that the land shown them was of much greater value than the same quantity, including these 200 acres, of rough, hilly land east of the road, the question then arises, What effect do such representations have upon the sale when it appears that they were erroneous? The question is not a new one. It has been considered by the courts in many cases, and the decisions are quite harmonious and founded in sound reason. The theory upon which they proceed is that the owner of real estate is presumed to know the location of his land, and if, in attempting to sell it, he undertakes to point out its location or its boundaries, he is bound to do so correctly. In other words, his representations amount, in effect, to warranties, and if the land he points out is of greater value than the land he actually sells, the purchaser may rescind the contract, or sue for damages."

Post v. *Liberty* (Montana, 1912), 121 Pac. 475.

We will now quote from the case of *Crandall* v. *Parks,* 152 Cal. 772, wherein the Court says:

"A statement as to the value of property is not always made as a mere expression of opinion upon which the other party has no right to rely. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such it is like any other representation of fact, and may be a fraudulent misrepresentation warranting rescission. The rule in regard to this matter is stated by Mr. Pomeroy as follows: 'Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own

opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such; then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation.' (2 Pomeroy's Equity Jurisprudence, section 878.) He further says that the statements which most frequently come within this branch of the rule are those concerning value."

Crandall v. *Parks,* 152 Cal. 776.

We will now quote from the case of *Strait* v. *Wilkins,* 16 Cal. App. 188, wherein the Court says:

"The rule that 'wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such,' then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation."

Strait v. *Wilkins,* 16 Cal. App. 188.

We will now cite the case of the *Baron Estate Co.* v. *Woodruff Company,* 163 Cal. 561. In this case the plaintiff was a corporation composed of members of the family of Edward Baron, deceased. The stockholders were heirs of the deceased, and none of its officers or stockholders knew anything or had any knowledge of architecture or of the construction of buildings. The defendant, by fraudulent representations, represented to the plaintiff that it would construct a first-class hotel for the plaintiff, not to

exceed the sum of $300,000. Defendant represented to the plaintiff that he had special skill and great experience in matters of this kind, and that the cost of the building would certainly not exceed $300,000, but in all probability would be less. After the work had progressed on the building, and several payments had been made, it became apparent that the building would probably cost more than $400,000, whereupon the defendant stated to plaintiffs, and to lull them into false security, that plaintiff would be entitled to receive large credits on account of moneys already expended for extra material ordered by defendants. Afterwards, in response to repeated demands on the part of the plaintiff as to how much less than $400,000 the building would cost, the defendants informed the plaintiff for the first time that the building would cost $510,000. Thereupon plaintiffs immediately stopped work and employed competent and honest experts to make an estimate of the cost of finishing the building, and was informed by these experts that to complete the building it would require the sum of not less than $700,000. Plaintiff brought this action to recover the false representations made by the defendants, and the Court, in deciding the case, was of the opinion that the representations made by defendants were statements of fact, and not of opinion, and in deciding the case says:

> "It is of course, generally speaking, true that an action for deceit cannot be founded upon the mere expression of an opinion. But the qualifications and modifications of this general rule are as

important as the rule itself. Those qualifications and modifications are numerous. It is unnecessary to attempt to illustrate them all, but, bearing in mind that an expression of an opinion, if honestly made, is an expression of what the speaker *believes to be* a fact, it becomes apparent that by the expression of a dishonest opinion to one entitled to rely upon it, deceit is practiced, injury may be worked, and an action will lie."

Barron Estate Co. v. *Woodruff Co.,* 163 Cal. 573.

We will now quote from the case of *Eichelberger* v. *Mills Land, Etc., Co.,* 9 Cal. App. 628, wherein the Court says:

"Courts of equity will not withhold relief from parties ignorant of the true condition, who, relying upon false representations as to material facts made for the purpose of inducing assent, are thereby inveigled into contracts, upon the ground that there were circumstances calculated to arouse their suspicion and cause an investigation whereby they might have discovered the swindle. The liability of the defendant arises from its own fraud and false representations, and is unaffected by the question of diligence on the part of plaintiffs in availing themselves of the opportunity afforded for determining the size of the tract of land, or their failure to give heed to such warning as the exhibition of the map afforded of defendant's dishonesty. * * *

"In the absence of any inquiry instituted by plaintiffs for the purpose of ascertaining the dimensions of the land, and in the absence of knowledge as to the true dimensions, both of which facts appear from the findings, plaintiffs were warranted in relying upon the representations in that regard made to them by the seller, Mills Land & Water Company. * * *

"The effect of these findings is that plaintiffs, instead of measuring the land and for themselves ascertaining the dimensions thereof, as they could have done, chose rather to rely upon the representations of defendant in relation to the same. Were they justified in so doing? As the representations were made prior to the transaction and directly related to it, it must be presumed that they were made for the purpose and with the design of inducing plaintiffs to enter into the contract. (Pomeroy's Equity Jurisprudence, section 880.) As a general rule the owner of real estate, in the absence of facts showing the contrary, is presumed to know the boundaries and area of his land, and a buyer is warranted in relying upon his representations in respect to such facts. It is immaterial whether the representations as to area be as to acreage or dimensions."

Eichelberger v. *Mills Land, Etc., Co.,* 9 Cal. App. 628.

We will now quote from the case of *Stevens* v. *Giddings,* 45 Conn. 507. In this case the line of a lot was represented as being 100 feet, whereas it was only 95½ feet. In its opinion the Court says:

"The controlling factor in this case is that there was a material deficiency in the quantity of land sold. * * * It would be altogether unusual for the purchaser to measure the depth of a lot after the seller by his circular had represented it to be of a certain depth, and his agent * * * had positively asserted at the time of the sale that it was of that depth. * * * We think the defendant had the right to rely on the representations of plaintiff and on the declarations of the auctioneer."

Stevens v. *Giddings,* 45 Conn. 507.

We will now quote from the case of *Lynch* v. *Mercantile Trust Co.,* 18 Fed. 486, wherein the Court says:

> "The owner of property, when he sells, is presumed to know whether the representation which he makes about it is true or false, and the positive statement thus made of a material fact, if false, is a fraud in law. A purchaser trusts in the owner's statements, and the law will assume that the owner knows his own property and truly represents it."
>
> *Lynch* v. *Mercantile Trust Co.,* 18 Fed. 486.

We will now quote from the case of *Quarg* v. *Scher,* 136 Cal. 406 (69 Pac. 96). In this case the contract described the land by metes and bounds and as "containing about forty acres, more or less." It was afterward ascertained by survey that the acreage in the tract was but 23½ acres. The Court, in rendering its opinion, said:

> "It is next insisted that the defendant saw the land and inspected it before making the contract, and, having every opportunity to learn of the quantity of the land, he had no right to take the word of plaintiffs on the question of quantity; in other words, that the rule of *caveat emptor* applies to the case. This contention is not well founded; the defendant had a right to rely on plaintiff's representation as to the quantity of land. The acreage of land is a thing that cannot be seen with the eye at a glance, but can only be ascertained with accuracy by scientific measurement, and when a vendor states to a vendee the amount of land in the tract which is the subject of the sale, such vendor will not thereafter be heard to say in a court of equity

the vendee had no right to believe him. (*Pringle* v. *Samuel,* 1 Litt. (Ky.) 43, 13 Am. Dec. 214.)"

Quarg v. *Scher,* 136 Cal. 406.

We will now quote from the case of *Bickel* v. *Munger,* 20 Cal. App. 633, wherein the Court says:

"In the case of *Rendell* v. *Scott* it is asserted that representations that a ranch was very rich and productive and would produce fifty bushels of wheat to the acre, and that a portion was good alfalfa land, and another portion rich in mineral deposits, were to be considered as matters of opinion rather than as false representations of facts where there was no averment excluding the idea that personal inspection had been had by the purchaser. We do not doubt, however, but that a cause of action might be predicated upon representations made as to condition and quality of soil and like matters, even though the same was exhibited to the party complaining, where such party was ignorant and inexperienced in such matters, and the party making the representations knew this and knew that the person with whom he was dealing relied upon him to express the truth as to such things. The Court here found that plaintiff and her sons, son-in-law and daughter were inexperienced in the business of ranching, and that plaintiff relied upon the representations made to her by Munger, and that the representations were made for the purpose of inducing plaintiff to make the exchange, and with the intention on the part of Munger that she should act in reliance upon such representations."

Bickel v. *Munger,* 20 Cal. App. 636.

ARGUMENT TO THE POINT THAT THE RELATIONSHIP BETWEEN PLAINTIFF AND RAMOS WAS CONFIDENTIAL IN CHARACTER.

We have, in law, what is known as fiduciary or confidential relationships, as, for instance, husband and wife, guardian and ward, and attorney and client. These relationships are of personal trust and confidence, and where a relationship of this character exists the person occupying the stronger position is held to the utmost good faith in respect to any bargain or transaction where money or profit passes between them. Thus, in the case of attorney and client, where in the course of their relationship an attorney purchases something from the client, or enters into some transaction with the client in respect to property, the attorney is held to the utmost good faith, and when the finger of accusation points toward any such transaction, the burden is at once thrown upon the stronger party to show that the transaction was perfectly fair and just in respect to the welfare of the weaker person.

These statements are elementary. The only point covered by this brief is that the relationship existing between a man and woman engaged to be married is such a relationship, and in respect to business transactions between the parties is in the same category with transactions between attorney and client, or guardian and ward. In other words, it is the purpose of this brief to show that persons engaged to marry occupy fiduciary relations.

We will now quote from the case of *Kline* v. *Kline,* 98 Am. Dec. 206, wherein the Court says:

> "There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category with buyers and sellers, and to say that they are dealing at arm's length, we think is a mistake."
>
> *Kline* v. *Kline,* 98 Am. Dec. 206, 57 Pa. 120.

We will now quote from the case of *Pierce* v. *Pierce,* 27 Am. Rep. 23, in which the Court says:

> "The relation of parties who are about to enter into the marriage state is one of mutual confidence, and far different from that of those who are dealing with each other at arm's length. This is especially true of the woman, and it is the duty of each to be frank and unreserved when about to enter into an ante-nuptial contract, by a full disclosure of all the facts and circumstances which may in any way affect the agreement."
>
> *Pierce* v. *Pierce,* 27 Am. Rep. 23, 71 N. Y. 154.

We will now quote from the case of *Wadell* v. *Lanier,* 62 Ala. 347, wherein the Court says:

> "In all the variety of relations of life in which confidence is reposed and accepted, and dominion may be exercised by one person over another, the court will interfere and relieve against contracts or conveyances when they would abstain from

> granting relief if any particular relation existed between the parties in which trust and confidence was reposed and accepted, and there was not an opportunity for an abuse of the confidence and the exercise of undue influence."
>
> *Wadell* v. *Lanier,* 62 Ala. 347.

Schouler on Domestic Relations, section 183:

> "Owing, moreover, to the confidential relation which subsist between the parties, an ante-nuptial contract which appears to have been unfairly procured will be set aside."

We will now quote from volume I, Bigelow on Fraud, 351:

> "Undue influence may easily be exercised under the intimate relation created by an engagement to marry."

ARGUMENT TO POINT THAT FORMER SUIT IN THE STATE COURT IS NOT A BAR TO THIS ACTION.

Defendants set up as a special defence in their answer to this action that plaintiff is debarred and estopped from bringing this suit by reason of the fact that before this action was commenced she had previously commenced an action in the State court in Sutter County, the complaint in which said action contained allegations sufficient to entitle plaintiff to rescission. The facts in this matter are, that before this action was commenced, plaintiff commenced an action in the State court in Sutter County based upon the same transaction as this present action. The

complaint in the State case contained allegations sufficient to sustain a prayer for rescission, and also contained allegations sufficient to entitle a rescission, and also sufficient to entitle plaintiff to a money judgment for damages for deceit. The prayer in the complaint of the State case says nothing of rescission, but does ask for damages, as is alleged in defendants' answer to the present case.

Defendants now contend that the commencing of that action in the State court amounted to an election and choice as between two inconsistent remedies, and that, having elected to stand upon one, she was thereafter debarred and estopped from pursuing the other. The digest and encyclopedias are full of general statements to the effect that where a plaintiff has before him two separate, distinct and inconsistent remedial rights, he must choose as to which one he will stand upon, and, having made an election, he is thereafter precluded from returning to the one he abandoned. As a general proposition this rule is no doubt correct, but when a specific case presents itself, it must be first ascertained whether or not the case comes within the rule. In the first place are the two remedies presented, inconsistent—that is, must one be chosen and the other abandoned. In the present instance it is also essential to determine whether or not the institution of the prior suit amounted to a final election. Thus, in deciding the question as to whether or not defendants' contention is sound, we must first decide whether or not the remedy of rescission and the remedy by money judgment for damages

are inconsistent to such a degree that one must be chosen and the other abandoned before action brought or before trial.

The next question is, was the filing of that suit in the State court a final election as between two inconsistent remedies? The plaintiff contends in this reply that the two remedies are not inconsistent, and that no choice or election as defendants contended for is necessary, and plaintiff also contends that the commencement of the action in the State court in Sutter County and its dismissal before trial do not amount to an election. In the first place, we want to state that where a person finds himself defrauded in a real estate transaction, and after the discovery of all the facts, he commences an action purely for money damages, without any reference whatever to rescission and without alleging facts necessary for a rescission, he would be thereafter debarred from prosecuting an action for rescission. The estoppel in that case, however, would not be by reason of the fact that he had made an election as between two inconsistent remedies, but the estoppel would be by reason of the fact that in filing the suit for damages purely he stood upon the contract, and his standing upon the contract amounted to a ratification of the contract, and, having ratified the contract, he would necessarily be thereafter estopped from repudiating it. He would be precluded from thereafter suing for rescission by reason of equitable estoppel. His standing upon the contract and his ratification of it in bringing the suit for damages amounted to a notification to the defend-

ants that he intended to keep the property, in which case the defendants might be led into so alterating their position as to be at a disadvantage in case rescission were thereafter sought. Such is not the case, however, where rescission is sought first and thereafter abandoned in lieu of a prayer for money damages. The two remedies are not inconsistent, and they may be sought in the same action at the same time, without any necessity of election before trial. Rescission is an equitable remedy which a plaintiff may have during a limited time in certain special cases. A money judgment for damages is a legal remedy which plaintiff may have at any time within three years after the discovery of the facts constituting the fraud. Under the State practice a plaintiff, upon finding himself defrauded in a real estate transaction, by acting promptly, in certain cases, may compel the defendant to trade back, so to speak, and in the same complaint he may set up facts entitling him to a money judgment, and in the same action may obtain the legal remedy in damages, together with the equitable remedy of rescission. He may compel the defendant to give back what he received in return for what he gave, and also give the plaintiff certain money as damages. Under the State practice the case may go to trial, and it may develop for various reasons that rescission is impossible, or that plaintiff is not entitled to rescission, but that plaintiff is entitled, under the pleadings and the proofs, to legal redress in the shape of money judgment for damages. In such a situation the rescission sought is the chief

and special remedy, and the damages sought is in the nature of an ancillary or supplemental remedy. The legal remedy for damages is a sort of alternative or second choice relief. That these propositions are sound, I do not think will be seriously disputed. Under the State practice a complaint may allege facts entitling the pleader to both an equitable and legal relief—that is, entitle the plaintiff to either or both damages and rescission. Upon the proofs he may be given either damages or rescission, or both.

In support of this contention we cite Pomeroy's Code Remedies, section 76 *et seq.,* wherein the writer treats of "The combination by the plaintiff of legal and equitable primary rights and of legal and equitable remedies in one action." We also refer to the Michigan case of *Glover* v. *Radford,* 79 N. W. 803, from which case we will hereinafter quote.

It cannot be contended that the commencement of the action in the State court and its dismissal without prejudice before hearing amounted to an election, for the reason that the complaint stated facts entitling the pleader to both the legal remedy of damages and the equitable remedy of rescission. The complaint prayed for damages, and plaintiff up to the very moment that the suit was dismissed, or, for that matter, any time before judgment, could have abandoned the case so far as rescission was concerned and relied solely upon the theory that she was entitled to the legal remedy in the shape of a money judgment in damages for deceit. That being so, how is it possible for defendants at this time to contend that

the commencing of that action in the State court amounted to an election of an inconsistent remedy, and in bar of the present action?

Under the State practice a plaintiff has control of his action up until the time that affirmative relief is asked by the defendant, and until that time he is entitled to dismiss his action without prejudice to the commencement of another action in the future. Assume that the complaint in the action in the State court had contended no facts entitling plaintiff to rescission, but had proceeded solely upon the theory of legal relief in damages; in that event defendant would not pretend to urge the State action as a bar to the present action. That is unquestionable.

Now, as the Court says by Van Fleet, Judge, in the case of *Hines* v. *Ward,* 121 Cal., at page 120, "The doctrine of election, as applied to a choice of remedies, which precludes a party from claiming repugnant rights, is but an extension of the general principles of equitable estoppel, and proceeds upon a like theory, that the inconsistent attitude of the party will put his adversary to some disadvantage." In other words, defendant is now seeking to invoke the principles of equitable estoppel to debar plaintiff in this action upon the ground that her action in filing this suit has put the defendants to some disadvantage. What disadvantage, may we ask, are defendants put to any more than they would have been put to had the complaint in the first instance prayed simply for damages, and had not contained any facts entitling plaintiff to rescission? It must

be remembered that in the State case, plaintiff, by the allegations in her complaint, was entitled to both the equitable remedy of rescission and the legal remedy of damages. The allegations of the complaint were sufficient for both remedies. It is impossible to draw a complaint stating a cause of action for rescission without at the same time stating a cause of action for damages in money. Defendants' answer alleges that said complaint prayed for $35,000 damages. That being the case, wherein was there any election between the legal remedy and the equitable remedy of rescission? Up to the time the action was dismissed there had never been any demurrer or motion or request of any kind upon the part of defendants to compel plaintiff to elect upon which grounds she would stand, and there was never any action taken by the Court to compel plaintiff to elect between the two. And, as we understand the law in respect to the State practice, plaintiff could not be compelled to say, "I will try for rescission and waive damages, or I will try for damages and waive rescission." Defendants now seek "the general principles of equitable estoppel" to cast the plaintiff in this action out of court; yet in their answer to the complaint in the State case they alleged that plaintiff had never made any tender or offer to return certain parts of the property involved, and that she had sold a large portion of the property involved, and that she was in no position to prosecute an action for rescission, inasmuch as rescission was impossible. If, as the verified answer of defendants alleges, rescis-

sion was impossible, and that remedy was not within her reach, she would in that action have been relegated to her remaining right to money compensation in damages. If the allegations contained in defendants' answer are true, then at the time plaintiff dismissed her action in the State case without prejudice, she, as a matter of fact, did not have any case as far as rescission was concerned, and, not having any case so far as rescission is concerned, she could not possibly have made any election, for it is settled beyond any possibility of argument that where a person mistakenly attempts to pursue a remedy which he does not have, such attempt does not amount to an election. (*Barnsdall* v. *Waltdmeyer,* 142 Fed. 420.)

Defendants in their verified answer in the State case denied that plaintiff was entitled to rescission by reason of the impossibility of putting the parties back where they were. That denial was a denial of that remedy, and if that was true she had no choice as to rescission, and if she had no choice she could not make an election. Does that not estop defendants from now saying that she *did* have a choice and that she *did* exercise it?

Defendants at all times resisted plaintiff's efforts to secure a rescission, and after the notice of rescission was served upon defendants, and before the State action was commenced, to-wit, on March 12, 1912, the defendants served, in due form, a legal and technical notice upon plaintiff in which they resisted and refused plaintiff's offer of rescission, and in which notice they stated that they did not "recognize her

right or privilege of rescinding or attempting to rescind transactions which they had had with her, and therefore respectfully declined to accede to her demands or any of them." If defendants had accepted plaintiff's offer of rescission, or had in any way acted upon it, the situation might have been different, but they resisted her offers and attempts at every step. Under these circumstances, are they not estopped by the very principles of equity which they seek to invoke against the plaintiff? Assuming now, just for the sake of argument, that the remedy by rescission and the remedy in damages were, as a matter of fact, two totally separate, distinct and inconsistent remedies, and that the plaintiff in the State action, as a matter of fact, discarded the remedy of damages and elected the remedy of rescission, still if it should have developed in the trial of the case in the State court that, as a matter of actual fact, her right to the remedy of rescission was gone, by reason of laches, or impossibility of putting the parties back where they were, she would not then have been precluded in any court of her subsequently resorting to her legal right of damages for deceit.

Now, the point is this: Defendants at all times and in every way denied that plaintiff at that time had a right to rescind. In order to uphold their contention that plaintiff made an irrevocable choice in favor of her alleged inconsistent remedy of rescission, they must now switch their position and say that she *did* have a choice, and that she elected, because if she had no choice by all the authorities

she could not elect. At this time will not the very principles of equity which the defendants seek against the plaintiff estop them from alleging the existence of a right in possession of plaintiff at a former time, when they at that time denied the existence of that right? He who seeks equity must do equity, and are the defendants to be permitted to now violently change their position simply because it seems to serve their purpose so to do?

Assuming for the moment that the remedy by rescission and the remedy by damages were irreconcilable and inconsistent, who is going to say, or how can it be determined now, whether or not plaintiff had sufficient grounds for rescission? In other words, must that issue be thrashed out in this action?

We think that the foregoing argument is sufficient to satisfy the Court of the correctness of our position, but we will cite a few cases wherein the dicta at least is squarely in point, and we might mention that we defy counsel for the defendants to produce a single case in any jurisdiction upholding their contention, wherein the facts are on all fours with the case at bar.

We will commence with the California case of *Montgomery* v. *McLaury,* reported in 143 California at page 83. The facts in this case were:

A man by the name of Montgomery had a ranch in Minnesota. Two brothers, from southern California, by the name of McLaury, were in Minnesota, and while there induced Montgomery to trade his farm in Minnesota for a piece of orange land which

they owned in southern California. The exchange was effected, and, as the orange land was held to be several thousand dollars more valuable than the Minnesota farm, Montgomery, after he received the deed for the orange land from the McLaury brothers, gave them a mortgage back on the property for $4,000. Montgomery then came west, and, after examining the property, which he had not seen before the trade, found that it was not as the McLaurys had represented it to be. He then brought an action in the State court to recover on the deal. His complaint, as the opinion states, was so framed and contained allegations sufficient to entitle the pleader to both the equitable remedy of rescission and the legal remedy of damages. The trial court rendered judgment equivalent to $4,800 in damages—that is, it ordered the cancellation of the $4,000 mortgage and awarded a money judgment for damages for $800. The defendant, on the appeal, attacked the complaint on the theory that inasmuch as it prayed for two inconsistent remedies and proceeded upon two inconsistent theories—that is, damages and rescission—that it was fatally defective. In deciding the appeal the Supreme Court of California sustained the trial court and held that "the only question to be considered was whether the facts alleged in the complaint, and found by the Court upon sufficient evidence, would support the judgment." This case is squarely in point, and a reading of this case will show conclusively that there could not possibly have been any election in the State case. The entire opinion is important, but,

owing to its length, we will only quote a few sentences, as follows:

> "The only question now to be considered is whether the facts alleged in the complaint, and found by the Court on sufficient evidence, will support the judgment, for there is no such rigid and inexorable rule as to election of remedies in cases of fraud as that for which the appellants contend. It is undoubtedly true that when one who has been defrauded in a contract elects to affirm it after discovery of the full extent of the fraud, he cannot afterwards claim a rescission. This is simply a result flowing from the general doctrine of estoppel. But an election to disaffirm a contract induced by fraud, and an effort to obtain a rescission, will not, if resisted, and especially if rendered impossible or difficult or of doubtful advantage by the act of the guilty party, bar an action based upon a subsequent affirmance of the contract, and the commencement of such an action is in itself an affirmance."
>
> *Montgomery* v. *McLaury,* 143 Cal. 88.

We will now quote from the case of *Wright* v. *Chandler,* 173 S. W. 1173, a Texas case decided February 10, 1915, in which the Court says:

> "The trial court erred in striking out the prayer for damages, since the same could not have operated as a surprise, because the facts justifying same were pleaded and had been all the while. No proof was necessary to meet the same that was not already in the record. The price paid and evidence of market value, etc., had all been shown. For that matter, appellants were entitled to the benefit of the testimony as to damages under their prayer for general and special relief in law and equity. While the Wrights, under the jury's finding, had lost their

right to rescission, it does not necessarily follow that they had lost their right to damages. A party electing to sue for damages affirms the contract, and therefore loses his right to rescind the same, but it does not follow that, by suing for rescission, the right to damages is lost in case it becomes necessary to change the cause to an action for damages. When a party has a cause for damages it will last until limitation intervenes, but when he brings a suit for damages he thereby puts an impassable barrier between him and the right to rescind the contract."

Wright v. *Chandler* (Tex., 1915), 173 S. W. 1176.

We will now quote from the case of *Steinbach* v. *Murphy et al.,* 128 S. W. 207, a Missouri case, decided in 1910, wherein the Court says:

"The rule in this State is that when a party has two remedies, the commencement of a suit and its dismissal before final judgment does not amount to such an election as will prevent the party from pursuing the other remedy. This question was raised in the case of the *Anchor Milling Co.* v. *Walsh,* 20 Mo., App. 107, in the St. Louis Court of Appeals, which held the doctrine to be as above stated. This case was followed by the same court in the case of *Lapp* v. *Ryan,* 23 Mo. App. 436, and those cases were followed by the Supreme Court of this State in the case of *Johnson-Brinkman Commission Co.* v. *Central Bank,* 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615. In the case of *Johnson-Brinkman Commission Co.* v. *Missouri Pacific Railway Co.,* 52 Mo. App. 407, the Kansas City Court of Appeals took the contrary view and certified that case to the Supreme Court, for the reason that their decision was in conflict with the St. Louis Court of Appeals in the two

cases above cited. The Supreme Court in this case (126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675) reviews the authorities on that question, and, while it finds that the authorities are not uniform upon it, yet their conclusion in that case was that the weight of authority sustains the position which we have previously stated that in case a party may have two remedies for the same wrong, then the mere bringing of a suit which is dismissed and not prosecuted to final judgment is not such an election as will prevent the party from afterward pursuing the other remedy, and the doctrine therein announced may now be said to be the settled rule of law in this State upon this question. This being true, our conclusion is in this case that the mere bringing of the suit in the State of Kansas, which was dismissed without being prosecuted to final judgment, was not an election of remedies, and did not start the statute of limitations to running, and hence this action is not barred for that reason."

Steinbach v. *Murphy et al.* (Mo., 1910), 128 S. W. 208.

We will now quote the entire opinion in the case of *Dooley* v. *Crabtree,* 109 N. W. 889, an Iowa case, decided in 1906. We will quote the entire opinion, which is as follows:

Deemer, J.:

"The division of the answer which was attacked by the demurrer pleads in substance to the following facts: That defendant obtained from plaintiff certain real estate in exchange for mining stock; that thereafter plaintiff, claiming that his property had been obtained by fraud and false representations, undertook to rescind the exchange, and tendered defendant the stock received by him (plaintiff) and demanded a recon-

veyance of the real estate, stating that he elected to rescind the transaction; that defendant refused to accept the stock so tendered and refused to reconvey the real estate, and that thereupon plaintiff commenced an action in the District Court of Polk County to recover said real estate; that the allegations in that petition were substantially the same as those made in this case; that that action was prosecuted in said District Court and defendant was obliged to employ counsel to defend the suit, and was put to great expense in so doing. It is claimed that these facts constituted an election on the part of plaintiff to rescind the sale, and that plaintiff cannot now sue for damages on the theory that he suffered damages by reason of the exchange of properties. As part of this division of the answer, defendant set forth the judgment entry in the proceedings which, he alleged, constituted an election, from which it appears that during the trial of a case brought against the Gladiator Consolidated Gold Mine & Milling Co. and C. H. Crabtree, defendant's counsel claimed that there was a misjoinder of causes of action in that plaintiff therein had stated a separate cause of action against each of the defendants, and moved that the action be abated or dismissed, or, if this were denied, that plaintiff be required to elect as to which cause of action he would pursue. The motion was made on behalf of each party. Upon this motion the trial court held that there was a misjoinder of parties and causes of action in that the action was against the company alone, but the prayer was for judgment against both defendants, and ordered that plaintiff's petition be dismissed at his costs. It was very clear that this judgment was not a former adjudication nor a bar to plaintiff's present suit, except on the theory of an election of rights or remedies. There was no trial upon the merits, and no judgment entered save a dismissal of the case because of misjoinder of parties and causes of action. In-

deed, it is not contended in argument that the judgment in the original case amounted to such an adjudication as barred plaintiff of recovery in the present action. But it is argued that by filing the original petition for rescission, plaintiff elected to disaffirm the contract, and that he cannot now be heard to say the contract was good and recover damages for the breach thereof. It is insisted that when the alleged fraud was discovered, plaintiff had the option of rescinding the sale and recovering his property, or affirming the sale and recovering damages on account of the fraud practiced upon him, but that he could not do both, and that when he elected to pursue the one remedy he 'made his bed and must lie in it.' This is the exact question presented by the demurrer, as we understand it, although we might well refuse to consider it for the reason that most of the allegations in defendant's answer are mere conclusions of law, and none of the pleadings in the original case are set out.

"While the petition in this case is apparently to recover damages, it is nevertheless alleged that plaintiff tendered back to defendant the stock received by him, and demanded the return of the property given in exchange, and further alleges that the stock received by him was of no value whatever, but that the property given by him for the stock was worth $6,000, and he asked judgment for $6,000. It is by no means clear that this amounted to an affirmation of the sale. It might as well be said to be an action to recover back the value of the property received by defendant upon the theory that plaintiff had done all he could in the way of rescission, and that he was seeking to recover the value of his property upon the ground that there was no valid exchange. But, however this may be, plaintiff did not pursue his original action to a decree. It was dismissed for the reasons stated, and there was no attempt to adjudicate his rights in the

premises. The ruling of the trial court upon the motion to dismiss was not appealed from, and that ruling conclusively established the fact that plaintiff had mistaken his remedy or had so gone about it that he could not recover in the form of action adopted by him. Thereafter he brought this suit, and is met with the pleading already stated. That the doctrine of election of remedies does not apply is well settled by our own cases: *Tyler* v. *Bowen,* 124 Iowa 453, 100 N. W. 505; *Thorson* v. *Baker,* 107 Iowa 49, 77 N. W. 510; *Smith* v. *Bricker,* 86 Iowa 285, 53 N. W. 250. And that the doctrine of election of rights has no application is equally well established. *Lemon* v. *Sigourney Bank* (Iowa), 108 N. W. 104, and cases cited; *Zimmerman* v. *Robinson* (Iowa), 102 N. W. 814. The cases already cited clearly rule this one and satisfactorily point out the distinction to be observed between such as these and those relied upon by appellant.

"It would be useless to further consider a matter already so fully covered by the cases cited.

"Our conclusion is that the ruling upon the demurrer was correct, and it is affirmed."

Dooley v. *Crabtree* (Iowa, 1906), 109 N. W. 889.

In the case of *Wright* v. *Ritterman,* 4 Robt. 704, 1 Abb. Pr. N. S. 428, it was held by the Superior Court of the City of New York:

"That the pendency of an action on a contract for goods sold and delivered will not prevent the bringing of an action for the conversion of the same goods; that the plaintiff may have two remedies in such a case, and an adjudication brought to obtain either, whether for or against him, may be a bar to the other, but at any time previous to such an adjudication he may discontinue the first action and proceed with the second.

"Something more than the mere bringing of a suit is necessary to make the election final and conclusive, and to constitute it the act must be a clear and affirmative one, changing the relations of the parties to the subject matter, and which the party making the election cannot retrace without the other's consent. *Deens* v. *Dunklin,* 33 Ala. 47; *Bennett* v. *Goldthwait,* 109 Mass. 494."

We will now quote from the case of *Johnson-Brinkman Commission Co.* v. *Missouri Pacific R. Co.,* 26 L. R. A. 840, wherein the Court says:

"The question then arises, How was it, or by whom was it, to be determined that the plaintiff herein mistook his remedy, in bringing the attachment suit? It will not be contended, we presume, that after it had been instituted, and although plaintiff's attorney had become fully satisfied that the action had been improvidently brought, yet it was necessary, in order to save to his client the right to sue in replevin, that he should, at his expense, prosecute the case to final judgment, in order to settle that question. Nor do we for one moment, suppose that that issue could be tried in this controversy. It necessarily follows that plaintiff must have determined for himself, upon the advice of his attorney—just as he did do—whether he would proceed with the attachment suit to final judgment or not, and, having determined to dismiss it, that he was not, by reason of having instituted it, estopped from bringing this action. We are aware that it was otherwise held in *O'Bryan* v. *Glenn,* 91 Tenn. 106, but that case seems to be so inconsistent with reason and justice that we must decline to give it our approval. The authorities which hold that a person having two inconsistent remedies, and electing to pursue one, cannot thereafter pursue the other, do so upon the ground of election, or

as most courts put it, estoppel. As was said in *Anchor Mill Co.* v. *Walsh, supra,* 'There is no element of estoppel in the case. There is no estoppel by record. for the attachment suit has not been prosecuted to judgment. There is not estoppel *in pais,* for the defendant has not taken such action, in consequence of the suing out of the attachment, that he will receive detriment, in a legal sense, from the conduct of the plaintiff in changing his position, and pursuing a different remedy. There were no intervening rights in this case from the time of suing out the attachment until that suit was dismissed, nor is it claimed that the defendant therein was by reason thereof induced to change his position with respect of the wheat in controversy. 'Estoppel *in pais* may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Bigelow, Estoppel, 4th ed. 445. The attachment suit was brought hastily, and without time, as appears from the record, for the attorneys who brought it to investigate the facts in the case, who, after having done so, came to the conclusion that it was improvidently brought, and dismissed it; and to hold, under such circumstances, that plaintiff is estopped by his election in that case from prosecuting this, in the absence of intervening rights, injury or change of position by anybody by reason thereof, would be, we think, invoking a harsh and very unjust rule. But aside from any misconception as to the institution of the attachment suit, as it was dismissed before judgment, before the rights of others had intervened, and as the defendant therein was in no way injured in consequence thereof, we are not inclined to hold that plaintiff is, by reason of the institution of that suit, estopped from prosecuting this. *Anchor Mill. Co.* v. *Walsh, Lapp* v. *Ryan,* and *Johnson-Brinkman*

Commission Co. v. *Central Bank of Kansas City, supra."*

Johnson-Brinkman Commission Co. v. *Missouri Pacific R. Co.,* 26 L. R. A. 842.

We will now quote from the case of *Glover* v. *Radford,* 79 N. W. 803. The facts of this case were as follows:

The plaintiff purchased part interest in a corporation, and claims to have been induced to purchase this stock by misrepresentations of defendants as to the earning capacity of the corporation. Plaintiff did not discover the fraud until a short time prior to the commencement of this action. He then sought to rescind but his offer was refused. He then brought this action joining counts based upon rescission and upon breach of the contract. The court held that the counts were inconsistent and required the plaintiff to elect which theory he would stand upon, and counsel chose rescission, taking exception to the ruling.

At page 804, the court says:

> "There can be no doubt that the two theories were inconsistent in a sense, because one is based upon the continuation of the contract and the other upon its rescission. The plaintiff attempted to rescind by tendering the stock and demanding the money that he paid for it. If there was fraud, he had the right to do this, provided he had not waived it and could put the defendants in *statu quo.* But he took the chance of being unable to convince the court and jury that he had not waived his right to rescind, and, if he should fail in this, he could not recover if he relied upon the single count, although the jury might find that he had been defrauded. If there was fraud,

and he did not succeed in rescinding the contract, he certainly ought to have the right to recover damages for the injury he had suffered, if any. Had defendants consented to rescission, and acted upon it, the case would have been different, for there might then have been an estoppel; but there is nothing in the nature of an estoppel here. We have frequently held that one is bound by his choice between inconsistent rights or remedies; but, where there is no estoppel, this cannot usually be, unless the person really had a right of election. In this case the plaintiff claimed that he had a right to rescind, and tried to rescind, but he did not succeed, either because he really had no such right, or because he failed to seasonably assert it. He supposed that he had a remedy growing out of rescission, but it turned out that he was mistaken, and this left him the right to recover for the fraud, if there was fraud. This subject was discussed in *McLaughlin* v. *Austin,* 104 Mich. 491, 62 N. W. 719; *Chaddock* v. *Tabor* (Mich.), 72 N. W. 1095; *Sullivan* v. *Ross Estate* (Mich.), 76 N. W. 310. It is a common practice to permit the joining of counts which state the cause of action differently, to prevent a possible variance between the declaration and the proof. The plaintiff should not have been required to elect between the counts of his declaration. The case being tried upon the theory of rescission, it was competent for the plaintiff to offer testimony to explain the delay in commencing the suit and excusing laches. The testimony of Mr. Combs was offered for that purpose. Being excluded, we cannot tell whether it would have sustained the claim of counsel or not, but we think that he should have been permitted to introduce such proof. We think a discussion of other questions raised unnecessary. The judgment is reversed, and a new trial ordered. The other justices concurred."

Glover v. *Radford et al.* (Mich. 1899), 79 N. W. 803.

We will now quote from the case of *First Nat. Bank* v. *Geo. R. Barse Live Stock Commission Co.*, 64 N. E. 1098, wherein the Court says:

"The answer of both parties admitted the commencement of said attachment suit, and its dismissal without prejudice on the date named in the bill, and the evidence shows that the suit was dismissed on the stipulation of the parties thereto. We are of the opinion the mere bringing of the attachment suit by the Barse Company, which suit did not proceed to judgment, but was dismissed upon written stipulation without prejudice, did not constitute an election, nor estop the Barse Company from setting up its claim to the fund in this case. In *Gibbs* v. *Jones,* 46 Ill. 319, it was held that, when an action of trover is brought, an action in *assumpsit* between the same parties, brought to recover the value of the property, and which was dismissed without prejudice, cannot be specially pleaded in bar of the action of trover. And in *Flower* v. *Brumbach,* 131 Ill. 646, 23 N. E. 335, it was said: 'The circumstance of a party having elected one of several remedies by action will not, in general, preclude him from abandoning such suit; and, after having duly discontinued it, he may adopt any other remedy.' To the same effect are *Stier* v. *Harms,* 154 Ill. 476, 40 N. E. 296, and *Barchard* v. *Kohn,* 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803. In *Johnson-Brinkman Commission Co.* v. *Missouri Pac. Ry. Co.,* 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675, it was held that an attachment suit brought by a vendor of personal property against his vendee, if dismissed before final judgment, does not estop him from subsequently maintaining an action of replevin to recover the chattels, in the absence of an intervening right, injury, or change of position by reason of the attachment. The word 'election,' as applied to remedies, is but another term for 'estoppel.' There is no element

of estoppel by record, as the attachment suit was not prosecuted to judgment; and there is no estopel *in pais,* for neither Wootters nor the bank has taken such action, in consequence of the suing out of the attachment, that they will receive detriment, in a legal sense, from the conduct of plaintiff. There were no intervening rights in the case from the time of suing out the attachment until suit was dismissed. Nor does it appear that the bank was, by reason of the commencement of said suit, induced to change its position with respect to the fund in controversy. If the attachment suit had proceeded to judgment, or there were intervening rights, or the position of the parties, by reason of the commencement of the suit, had been changed, a different question would be presented; but it having been dismissed upon the written stipulation of all the parties, without prejudice to the rights of any of them, all are in the same position they would have been if the suit had never been begun."

First Nat. Bank v. *Geo. R. Barse Live Stock Commission Co.* (Ill., 1902), 64 N. E. 1097.

In the case of *Jones* v. *Magoon,* 138 N. W. 686, the Court held:

"An attempted rescission by serving notice of intent to rescind and offering back, which was refused by defendant, is not a bar to a subsequent action for damages."

In the case of *Otto* v. *Young* (Mo., 1910), 127 S. W. 9, it was held by the Court:

"Mere institution of suit of damages which was dismissed before judgment was not a bar for specific performance."

We will now quote from the case of *Rankin* v. *Tygard,* 198 Fed. 795, wherein the Court says:

"When a wrong has been perpetrated and the victim is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one, and, in the absence of facts creating an equitable estoppel, his prosecution of the wrong remedy to a judgment of defeat, will not estop him from subsequently pursuing the right one to victory."

Rankin v. *Tygard,* 198 Fed. 806.

We will now quote from the case of *Spurr et al.* v. *Home Ins. Co.,* 42 N. W. 206, wherein the Court says:

"This is an action to reform a policy of insurance, and to recover upon the same as reformed. It is urged on the part of the respondent that the plaintiffs cannot maintain this action, because prior to its commencement they had commenced an action to recover upon the policy now sought to be reformed. The doctrine of election as between inconsistent remedies is relied upon. We think that the conclusion of the learned judge of the district court, adverse to the respondent, was correct. The former action was dismissed without any final determination. The findings of the court in this case do not disclose clearly the circumstances attending the dismissal of the former action, nor are they otherwise shown in this record. It may be inferred, however, that the dismissal, which was upon the plaintiffs' motion after trial had commenced, was because, having commenced the action upon the theory that the proper legal construction of the policy without reformation was such as the plaintiffs now claim the agreement to have been, and such as entitled the plaintiffs to the recovery sought, they found themselves unable to recover upon the very different construction which the court put upon the policy. If such were the case, the proper remedy having been misconceived merely by reason of the failure of the plaintiffs to correctly apprehend the

legal construction of the written instrument, which was supposed to embody their agreement, and no advantage, benefit, or remedy having been secured by means of that action, nor the adverse party prejudiced, and that action having been dismissed without a determination of the merits, the plaintiffs were not precluded from maintaining this action. *Bitzer* v. *Bobo,* 38 N. W. Rep. 609; *Canal Co.* v. *Hewitt,* 62 Wis. 316, 21 N. W. Rep. 216, and 22 N. W. Rep. 588; *Butler* v. *Hildreth,* 5 Metc. 49, 52; *Peters* v. *Ballistier,* 3 Pick. 495, 505; *Railway Co.* v. *Swinney,* 91 Ind. 399; Bigelow, Estop. (4th ed.) 692; *Thayer* v. *Arnold,* 32 Mich. 336, 341; *Brewster* v. *Striker,* 2 N. Y. 19. In *Thomas* v. *Joslin,* 36 Minn. 1, 29 N. W. Rep. 344, the former action had proceeded to a judgment for the defendant on the merits. It is said in the opinion, with reference to the right of the plaintiff to maintain the subsequent action for reformation, that 'in such cases the plaintiff should take a dismissal in the nature of a nonsuit, before final submission on the merits'."

Spurr et al. v. *Home Ins. Co.* (Minn., 1889), 42 N. W. 206.

We will now quote from the case of *Vail* v. *Reynolds* (N. Y., 1890), 23 N. E. 303, wherein the Court says:

"He may also bring an action in equity to rescind the contract, and in that action have full relief. *Allerton* v. *Allerton,* 50 N. Y. 670. Such an action is not founded upon a rescission, but is *maintained for a rescission,* and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received, and make tender of it on the trial."

Vail v. *Reynolds,* 23 N. E. 303 (N. Y., 1890).

We will now quote from the case of *Houston Mer-*

cantile Co. v. *Powell & King,* 130 N. Y. S. 274, wherein the Court says:

"This proceeding was brought to dispossess the defendants (tenants). The real defense lies in a counterclaim for damages for fraudulent representations of plaintiff, inducing defendants to make the lease.

"At the opening of the trial there was introduced in evidence the summons and complaint in an action brought in the Supreme Court by the present defendants against the plaintiff (landlord) setting up fraudulent representations of the landlord coincident with the making of the lease in question, and asking that the lease be annulled, declared void, and set aside, and that the tenants have judgment for the amounts already paid by them and their damages, which are set out in detail. Thereupon there ensued a colloquy between counsel and the court, in which the points presented are far from clear. Plaintiff's counsel urged that the bringing of the action in the Supreme Court (which was instituted after the commencement of the summary proceedings and before the defendants' answer therein had been interposed) constituted an election on the part of the defendants (tenants) in this action to rescind the lease, and that such conduct concluded them from maintaining their counterclaim (under Code Civ. Proc., sec. 2244) in the present action, because the suit in equity necessarily involved the contention on the part of the defendants that the lease was at an end. If this were correct, the question whether the rent had been paid would become immaterial; it being, of course, conceded by defendants that the rent was not being paid. In other words, if the lease were at an end the plaintiff would be entitled to possession.

"The learned trial judge decided that the action in the Supreme Court constituted an 'election' on the part of the tenants to rescind the lease. He

gave judgment for the plaintiff, restoring possession of the premises to it. It must be noted, however, that the Supreme Court action was not one at law for return of the money paid by the tenants, proceeding on the theory that the lease *had already been rescinded,* but was an action in equity *praying for an adjudication declaring* the lease to be annulled and asking for a return of money paid and for damages. The bringing of such an action does not constitute an *election* to rescind, in the sense in which the doctrine of inconsistent remedies is applied. The election with which the courts are usually concerned consists of a choice of inconsistent remedies as between suing on tort or in contract in case of conversion (see *Terry* v. *Munger,* 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803), or the bringing of an action for replevin as opposed to a subsequent action to recover the purchase price (*Morris* v. *Rexford,* 18 N. Y. 552), or choosing between an action based on affirmance and one based on rescission of a contract or of a contractual transaction (see *Droege* v. *Ahrens Mfg. Co.,* 163 N. Y. 466, 470, 57 N. E. 747). In all these cases it will be observed that the actual present mental attitude conclusively evidenced by the bringing of one action, is inconsistent with the different attitude necessary to sustain the other. The principle would apply in the case at bar, if the tenants had actually rescinded and brought an action at law for the money previously paid by them. By bringing their action in equity, however, they have merely evidenced an intention to ask a court of equity to declare the lease annulled.

"In the leading case of *Gould* v. *Cayuga National Bank,* 86 N. Y. 75, 83, where the three courses open to a person who has been induced to enter into a contract by fraud are clearly defined, the character of the action brought by the defendants in the case at bar is significantly described as follows:

" 'He may bring an action in equity to rescind the contract, and in that action he may have full relief. Such an action does not proceed *as upon* a rescission, but proceeds *for* a rescission.'

"See, also, *Vail* v. *Reynolds,* 118 N. Y. 297, 302, 23 N. E. 301.

"There are some expressions—rather *obiter* in their way—in some cases from which some doubt as to the correctness of this position might be derived; but that could only be as the result of straining the meaning of the court. See *Roberge* v. *Wynne,* 144 N. Y. 709, 712, 39 N. E. 631, an opinion in which it is stated that the majority of the court did not concur; *Barnsdall* v. *Waltemeyer,* 142 Fed. 415, 420, 73 C. C. A. 515; *Koke* v. *Balkan,* 15 App. Div. 415, 417, 44 N. Y. Supp. 426. In the case last mentioned an unsuccessful suit in equity of the kind involved in the case at bar is spoken of as a 'futile *attempt* to set aside a transaction.' In *Bracken* v. *Atlantic Trust Co.,* 167 N. Y. 510, 60 N. E. 772, 82 Am. St. Rep. 731, an action in equity *prosecuted to decree,* requiring the delivery of certain stock to plaintiff, was held to constitute a bar to an action at law on the same cause of action for damages for violation of defendant's duty to sell and apply the proceeds of the same stock. It may well be that the setting up of the defense of fraud as a counterclaim in the present action may—indeed, probably will—require a denial of relief in the action in equity, if the latter be continued. *Morris* v. *Rexford, supra,* at page 558 of 18 N. Y. See, also, *Woods* v. *Garcewich,* 67 App. Div. 53, 57, 73 N. Y. Supp. 472. I believe, therefore, that the learned trial judge was in error in holding that the bringing of the action in equity constituted an election to treat the lease as rescinded as a present fact."

Houston Mercantile Co. v. *Powell & King,* 130 N. Y. S. 275, 276.

We will now quote from the case of *Union Cent. Life Ins. Co.* v. *Drake,* 214 Fed. 536, wherein the Court says:

> "* * * And third, because of the controlling rule in cases of the class to which this suit belongs is that even where the victim of a wrong has inconsistent remedies, and he is doubtful which is the right one, he may pursue any or all of them until he recovers through one, and in the absence of facts creating an equitable estoppel, and there are none in this case, his prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one to victory."
>
> *Union Cent. Life Ins. Co.* v. *Drake,* 214 Fed. 548.

We will now quote from the case of *Marshall* v. *Gilman,* 53 N. W. 811, wherein the Court says:

> "The former action for rescission does not preclude the plaintiff from recovering damages in this action for a breach of the representations and warranty. In the former case it was decided that the right to rescind, which right must be exercised promptly, if at all, had been lost by a failure of the plaintiff to seasonably avail himself of it, and by conduct respecting the property inconsistent with an intention to exercise that right and amounting to an election not to do so. But the prosecution of that action without avail did not preclude resort to the remedy here sought. The former action did not involve a determination of the right of action now relied upon, nor is there any such inconsistency between the two actions that by resorting to the former, the plaintiff can now be deemed to have lost, by force of the doctrine of election, the right to maintain this action. * * * The mere fact that the plaintiff, after he had lost the right to rescind, sought in vain

to avail himself of that remedy by action, should not bar his right to recover damages on the contract."

Marshall v. *Gilman* (Minn., 1892), 53 N. W. 811.

We will now quote from the case of *In re Van Norman,* 43 N. W. 334, in which the Court says:

"A mere attempt to claim a right or pursue a remedy to which a party is not entitled, and without obtaining any legal satisfaction thereupon, will not deprive him of the benefit of a right or remedy which he originally had a right to claim or resort to. The doctrine of election between inconsistent rights or remedies has no application to such a case."

In re Van Norman (Minn., 1889), 43 N. W. 334.

We will now quote from the case of *Barnsdall* v. *Waltemeyer,* 142 Fed. 415, wherein the Court says at page 420:

"The fifth defense was that the plaintiff brought a suit in equity against the defendant in the court below to rescind the agreement which the plaintiff is seeking to enforce in this action for the misrepresentation and fraud of the defendant and for his failure to perform his part of the contract, and that that suit was, on August 3, 1903, dismissed upon its merits. It is contended that by the institution and prosecution of this suit in equity the plaintiff irrevocably elected to rescind the contract, and thereby estopped himself from maintaining this action to enforce it. But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had existence is no defense

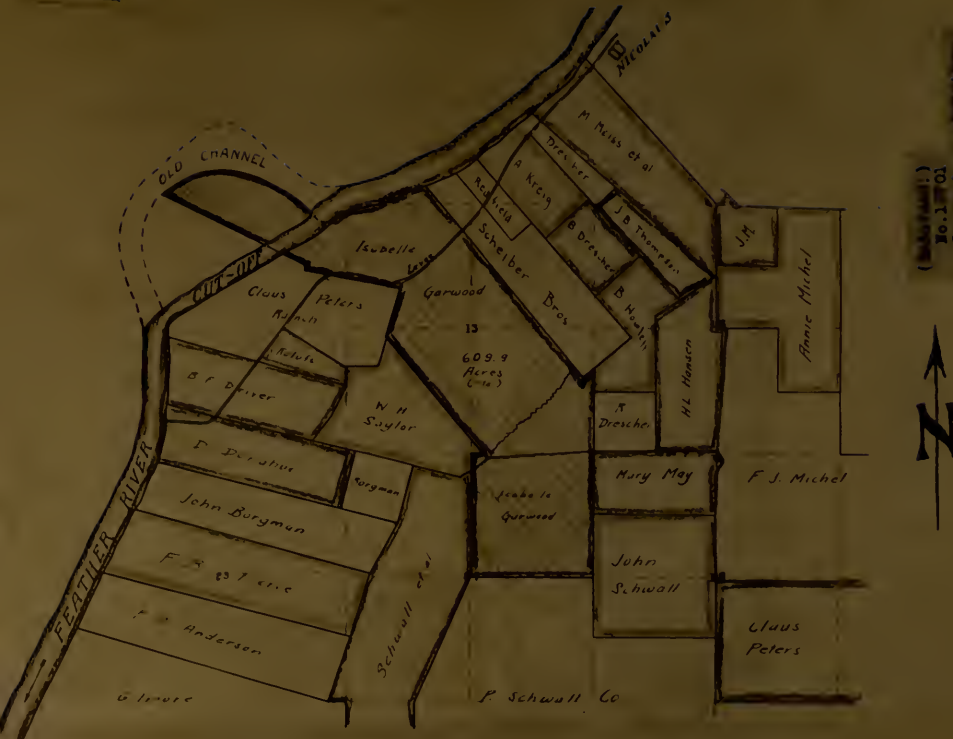
to an action to enforce an actual remedy inconsistent with that first invoked through mistake." (Citing many cases.)

Barnsdall v. *Waltemeyer,* 142 Fed. 415.

Respectfully submitted,

LLOYD MACOMBER,

Attorney for Plaintiff in Error.



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